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# TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 76

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY  
COMPANY, PETITIONER,

vs.

ERNEST J. GONEAU

ON A WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF THE  
STATE OF MINNESOTA

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PETITION FOR HABEAS CORPUS FILED MAY 21, 1926

HABEAS CORPUS GRANTED JUNE 9, 1926

(35,373)

TRANSMITTAL OF RECORDS

(30,373)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 413

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY  
COMPANY, PETITIONER,

*vs.*

ERNEST J. GONEAU

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF MINNESOTA

INDEX

|  | Original | Print |
|--|----------|-------|
| Record from district court of Beltrami County..... | 1        | 1     |
| Amended complaint.....                             | 1        | 1     |
| Demurrer .....                                     | 5        | 3     |
| Order overruling demurrer.....                     | 5        | 3     |
| Answer .....                                       | 6        | 4     |
| Reply .....  | 8        | 4     |
| Settled case.....                                  | 8        | 5     |
| Argument of counsel.....                           | 8        | 5     |
| Testimony of Ernest J. Goneau.....                 | 21       | 11    |
| Dr. Herman A. Drechsler.....                       | 140      | 69    |
| Dr. H. E. Webster.....                             | 180      | 95    |
| Dr. E. F. Jamison.....                             | 203      | 106   |
| Dr. Frank C. Sarazin.....                          | 229      | 120   |
| Dr. Arthur S. Hamilton.....                        | 302      | 158   |
| Donald McIntosh.....                               | 371      | 193   |
| Frank X. Rocheleau.....                            | 387      | 201   |
| George Barnaby.....                                | 468      | 245   |
| Price M. Manchester.....                           | 504      | 264   |

|  | Original | Print |
|--|----------|-------|
| Testimony of Sylvester H. Bailey.....  | 514      | 269   |
| Ernest J. Goneau.....  | 549      | 289   |
| A. D. Roth.....  | 550      | 289   |
| Henry Greenseth.....   | 553      | 291   |
| A. D. Roth (recalled).....   | 566      | 293   |
| Henry Greenseth (recalled).....  | 566      | 298   |
| Ernest J. Goneau (recalled).....   | 592      | 313   |
| Donald M. Trask.....   | 593      | 313   |
| Fay Mossa.....   | 624      | 330   |
| George P. Zachritz.....  | 636      | 336   |
| Ernest J. Robertson.....   | 663      | 350   |
| Henry Greenseth.....   | 667      | 353   |
| Defendant's motion for a directed verdict.....                                   | 669      | 353   |
| Argument of counsel.....   | 671      | 355   |
| Charge to the jury.....  | 712      | 375   |
| Defendant's requested instructions given to jury.....                            | 728      | 382   |
| Defendant's requested instructions refused.....                                  | 731      | 384   |
| Plaintiff's Exhibit F—Statement of F. X. Rocheleau..                             | 735      | 387   |
| Verdict .....  | 737      | 388   |
| Order settling case.....   | 738      | 388   |
| Notice of motion for judgment notwithstanding the verdict<br>or a new trial..... | 739      | 389   |
| Order denying motion for judgment.....   | 754      | 397   |
| Notice of appeal.....  | 755      | 398   |
| Proceedings in supreme court of Minnesota.....                                   | 756      | 398   |
| Assignment of errors.....  | 756      | 398   |
| Opinion .....  | 774      | 409   |
| Stipulation for entering judgment of affirmance.....                             | 782      | 413   |
| Judgment .....   | 783      | 413   |
| Clerk's certificate to entry of judgment.....                                    | 783      | 413   |
| Mandate to district court.....   | 784      | 414   |
| Record from district court of Beltrami County.....                               | 786      | 415   |
| Stipulation re costs, etc.....   | 786      | 415   |
| Judgment .....   | 788      | 416   |
| Notice of appeal.....  | 789      | 416   |
| Assignment of errors.....  | 790      | 417   |
| Waiver of bond on appeal.....  | 798      | 421   |
| Proceedings in supreme court of Minnesota.....                                   | 799      | 421   |
| Stipulation re submission of cause on printed record.....                        | 799      | 421   |
| Opinion per curiam.....  | 800      | 422   |
| Petition for stay.....   | 801      | 423   |
| Order staying further proceedings.....   | 803      | 423   |
| Judgment .....   | 803      | 424   |
| Clerk's certificate.....   | 805      | 425   |
| Order granting petition for certiorari.....                                      | 807      | 425   |

[fol. 1] **IN DISTRICT COURT OF BELTRAMI COUNTY,  
15TH JUDICIAL DISTRICT**

STATE OF MINNESOTA:

ERNEST J. GONEAU, Plaintiff,

vs.

MINNEAPOLIS, ST. PAUL & SAULT SAINTE MARIE RAILWAY  
COMPANY, Defendant

AMENDED COMPLAINT

The plaintiff for his amended complaint herein states and alleges:

I

That the defendant is a railroad corporation, organized under the laws of the state of Minnesota; that during the times herein mentioned and as a common carrier of freight and passengers for hire, it owned and operated an extensive railroad system into and through the states of Wisconsin, Minnesota and other states, together with the usual railroad equipments; that one of its said railroad lines extended [fol. 2] from Chicago, Illinois, through the state of Wisconsin to the city of Duluth, in the states of Minnesota, with a station thereon in the state of Wisconsin known as Gordon and which said railroad at a point about one mile northerly from Gordon, extended over a bridge or trestle, and that during all the times herein mentioned the defendant was engaged in interstate commerce by and over said railroad.

II

That on the 27th day of October, 1920, the plaintiff was in the employ of the defendant for hire as a freight brakeman, engaged in the performance of his duties upon and in connection with the operation by the defendant of one of its freight trains over said line and through said Gordon; that on said date and at about 6 o'clock in the afternoon said freight train reached and stopped upon said bridge for the reason and because one of the drawbars in one end of one of the cars in said train, and constituting a part of the automatic coupler upon said car, was defective, broken and out of order so that said automatic coupler uncoupled and caused said train to break in two; that it thereupon became the duty of the plaintiff to couple said cars; that in order to do so it was necessary for the plaintiff to and plaintiff did go between said cars and necessary for him to repair and readjust and replace said drawbar in position so that said two cars could couple on impact; that a certain iron, known as carrier iron and extending underneath said drawbar, had broken and fallen from its position, thus permitting

[fol. 3] and causing said drawbar to drop so that said coupling could not be made and so that said two drawbars, if coupled, would not remain coupled; that in order to do said work it was necessary for the plaintiff to stand upon said bridge; that while he was endeavoring to readjust and repair said coupler so as to enable said coupling to be made, said carrier iron, which he was attempting to draw back into place, suddenly gave way and the plaintiff was then and thereby thrown from his position and caused to fall from said bridge a distance of about 40 feet to the ground whereby he was very seriously and permanently injured; that at said time and place the defendant carelessly, negligently and unlawfully, and in violation of the Federal Safety Appliance Laws, failed to have upon said car an automatic coupler which would couple on impact and without the necessity of the plaintiff going between the cars to make said coupling, and carelessly, negligently and wrongfully failed to have a reasonably safe and proper appliance and fastenings to hold said coupler or drawbar in proper position, and carelessly, negligently and unlawfully ordered and required plaintiff to work upon said train with a car therein which was not equipped with a safe and proper coupler, and that said accident and injuries were caused solely for the reasons aforesaid; that the plaintiff was injured while employed in interstate commerce.

### III

That in said accident plaintiff had seven (7) ribs on his left side [fol. 4] broken and fragments thereof driven into and seriously and permanently injuring his left lung; that his left shoulder and arm and nerves were severally bruised and permanently injured; that on account of the injuries to his side, lungs, left shoulder and arm, the muscles and nerves around said portions of his body have been permanently shrunken and weakened; that on account of said fall and injuries to the muscles and nerves above stated, his spine has become and is and always will be badly curved and weakened; that his sacro-iliac joint was and is injured and separated and permanently impaired; that on account of said fall and said injuries to his ribs and lungs and muscles and nerves his heart action has been impaired and weakened and that such injury is also permanent; that the muscles and tendons in and around his groins were severally strained and injured; that he became and ever since has been totally disabled and has suffered continuously intense pain and anguish both of body and mind, and as he is informed and verily believes, that he will always be an invalid and totally unable to resume his occupation and to a very large degree disabled for any occupation and will always suffer much pain and anguish; that he is 32 years of age, an experienced brakeman, and that he was earning at least \$200.00 per month; that for the reasons aforesaid he has been damaged by the defendant in the sum of forty thousand dollars (\$40,000.00).

Wherefore, plaintiff demands judgment against the defendant for [fol. 5] the sum of forty thousand dollars (\$40,000.00), and for his costs and disbursements herein.

Samuel A. Anderson, Attorney for Plaintiff, 515 Exchange Bank Bldg., S. Paul, Minnesota.

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IN DISTRICT COURT OF BELTRAMI COUNTY

DEMURRER

Defendant demurs to the amended complaint of the plaintiff herein and for ground of demurrer alleges:

I

That the facts stated in said complaint do not constitute a cause of action.

Dated January 26th, 1921.

Marshall A. Spooner, Bemidji, Minnesota; John E. Palmer, 1427 First Nat'l-Soo Bldg., Minneapolis, Minnesota, Attorneys for said Defendant. H. B. Dike, of Counsel.

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IN DISTRICT COURT OF BELTRAMI COUNTY

ORDER OVERRULING DEMURRER

Demurrer to the amended complaint having been interposed and both oral and written arguments having been made thereon, Messrs. Marshall A. Spooner and John E. Palmer appearing as attorneys for defendant in support thereof, and Mr. Samuel A. Anderson appearing [fol. 6] ing as attorney for plaintiff in opposition.

It is ordered that said demurrer be and the same is hereby overruled, with leave to defendant to serve its answer within fifteen (15) days after the service of notice of the filing of this order.

Dated August 5, 1921.

By the Court,

C. W. Stanton, District Judge.

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MEMO.

The conclusions reached by me, after very careful and painstaking study and analysis of all of the authorities cited by counsel and other cases found through my own research, which conclusions have induced me to overrule the demurrer, are, in my opinion, so free from doubt that I do not feel justified in certifying that the questions presented are "important and doubtful" as urged by counsel for defendant, and so to delay the trial of this action.

## IN DISTRICT COURT OF BELTRAMI COUNTY

## ANSWER

Defendant interposes the following answer to plaintiff's amended complaint:

## I

It admits the allegations of paragraph I thereof; it admits that on or about October 27th, 1920, plaintiff was in its employ as a freight brakeman; it admits upon information and belief that on or about said date plaintiff sustained some injury by falling off a [fol. 7] bridge near Gordon, Wisconsin; it denies that said injury was of a serious or permanent character as alleged in the complaint or otherwise.

## II

It expressly denies that such injury as plaintiff sustained at said time and place was in any manner caused or contributed to by any negligence or violation of law or duty on its part; it alleges that whatever injury plaintiff sustained was due to risks and hazards which plaintiff knowingly and voluntarily assumed; that said injury was directly and solely caused by the negligence of plaintiff himself; and that the negligence of the plaintiff contributed thereto.

## III

It denies each and every allegation, averment, matter and thing and each and every part thereof in said complaint contained, save as hereinbefore admitted or qualified.

Wherefore, defendant prays that plaintiff take nothing by this action and that it have judgment for its costs and disbursements herein.

Dated August 20th, 1921.

Marshall A. Spooner, Bemidji, Minnesota, John E. Palmer,  
1427 First Nat'l-Soo Line Bldg., Minneapolis, Mipnnnesota,  
Attorneys for Defendant. H. B. Dike, of Counsel.

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[fol. 8] IN DISTRICT COURT OF BELTRAMI COUNTY

## REPLY

Now comes the plaintiff and for his reply to the answer of the defendant in the above entitled action, denies each and every allegation in said answer contained and each and every part thereof, save and except such parts or portions thereof as constitute admissions of allegations contained in the complaint.

August 22nd, 1921.

Samuel A. Anderson, Attorney for Plaintiff, 515 Exchange  
Bank Building, St. Paul, Minnesota.

## IN DISTRICT COURT OF BELTRAMI COUNTY

**Settled Case**

The above entitled action came on for trial at the February, 1923, general term of the above named court, on Monday, February 26th, 1923, at 9:00 o'clock A. M., before the Honorable C. W. Stanton, judge presiding, and a jury duly impaneled therein, Mr. Samuel A. Anderson appearing as counsel on behalf of the plaintiff, and Messrs. M. A. Spooner and John E. Palmer appearing as counsel for the defendant.

The following is a transcript of the testimony taken and proceedings had upon the trial of said action:

## ARGUMENT OF COUNSEL

## Opening statement of Mr. Anderson.

Mr. Anderson: May it please the court and gentlemen of the jury. [fol. 9] At the outset, so you will understand as best you can the situation, this action is based entirely upon what will be spoken of as a federal law, United States statutes, as distinguished from the state laws. In other words, so far as the rights of the parties are concerned in this case the laws of Wisconsin and the laws of Minnesota cut no figure. The plaintiff was injured while employed in what is spoken of as interstate commerce work. That is, he was working upon a freight train that was carrying merchandise running from one state into and through another, so that brings him under the Employers Liability Act of Congress in that respect and it will be admitted that he was so employed and it will be admitted that the Soo Railroad Company owns and operates an interstate railroad running between various states and that the train in question was a train running from Chicago to Superior, undoubtedly cars going across to Duluth and other places. An element of this action is also based upon what is known as the Federal Safety Appliance Laws, statutes passed by Congress beginning in 1893, for the purpose of compelling the railroad companies to use certain safety appliances upon their cars. So far as this case is concerned, it will be confined to the portion of the statute requiring them to have what is spoken of as automatic couplers on their cars and in condition to use, so that the cars could be coupled and uncoupled without the necessity of anyone going between the cars for that purpose. And I speak of that and emphasize it because this case originates out of a broken [fol. 10] coupler, defective coupler.

With that general statement I will say that the plaintiff was in the employ of the defendant railroad company as a freight brakeman in October, 1920. As already intimated, this case has been tried before, pretty nearly a year and a half ago. The Supreme Court did not agree with some of us and back here we are to try it over again, but the accident happened, as I say, in October, 1920.

October 27th, I think it was. At that time the plaintiff was acting as rear brakeman upon the freight train in question. When there are two brakemen one is the rear brakeman whose general duties are back towards the rear of the train and the other brakeman is known as the head brakeman whose duties are up at the head of the train or by the engine. Previous to this date the plaintiff was acting as head brakeman, but on this particular date he had taken another man's place and was acting as rear brakeman. There are several division points on the railroad running from Chicago up to Superior. One of those division points is known as Ladysmith, Wisconsin. That is the division point where Mr. Goneau and his crew took this westbound freight train which was coming up from Chicago. Throughout this case it will be spoken of as west-bound, although it was pretty well north. So this crew took it at Ladysmith, at that division point, and the end of their division is Superior, Wisconsin, the crew consisting of the engineer, fireman, head brakeman, Mr. Goneau rear brakeman, and Mr. Bailey was conductor in charge [fol. 11] of the train. The train consisted of a locomotive engine and seventy cars. There were some loaded cars and some empty cars. It is immaterial here. I have forgotten how far it was from Ladysmith to Gordon, but quite a long distance, possibly sixty miles. It is immaterial; somewhere around there. When the train was taken by this crew at Ladysmith it was made up, even the caboose was on, this crew simply putting on their own engine and continuing the journey of the train out of that place. From that time on until this accident occurred just west of Gordon, the train was stopped, I think, about three times, twice I believe to take coal and water, once to take a side track to let a passenger train, which has superior rights, pass. But not for the purpose of switching out or putting in any cars. There was no change in the personnel of the cars at all of the train from the time they started. I have forgotten where this car we speak about later was picked up. In fact, our side of it won't bring it out. We don't know anything about it.


As the train came to Gordon, a small station down there, there was to be no stop at that place so the train ran right through at pretty good speed, possibly fifteen, twenty, twenty-five miles an hour, nobody knows exactly, and as the train passed through Gordon the plaintiff and the conductor were both properly riding in the caboose. Just after the caboose had passed out of the west end of the yard at Gordon the train stopped very suddenly. It is spoken of by Mr. [fol. 12] Goneau who testifies in his own behalf, as an emergency stop, meaning by that the character of the stop was such as would occur in case you tried to stop them in an emergency.

It then became the duty of the plaintiff, as brakeman to get out of the caboose and go and discover what reason there was for the train stopping out there between stations. And he was so ordered by his conductor, Mr. Bailey. Both of these gentlemen concluded probably the trouble was a broken air hose.

Very likely this is as good a place as any to tell you something about those appliances for they will be mixed up in this law suit quite considerably. As you all know, and this is another safety ap-

pliance law, all these trains must be equipped with air brakes, as distinguished from hand brakes, so that the train can be controlled and handled by the use of the air brakes through the valve of the engineer on the engine. Every car is equipped with air brake appliances. The engine is equipped with the air brakes. It is equipped with the machinery that manipulates them through the train. They are all operated by air coming from the engine. In order to get the air back we have pipes running under each car and of course each car would have to have its own iron pipe. In this case we have seventy of them, there being seventy cars. In order to make that air pipe continuous, we have between each car these air hose that you see hanging down and when they are coupled up they are hanging down between each car. Those are the air hose, made of [fol. 13] rubber and canvas so that they are flexible and will move and bend and when you uncouple them hang down. That is what I spoke of a while ago as air hose.

Now, if anything happens that one of those air hose, as our testimony will show bursts, breaks and has an opening in it so air gets out that will snap the brakes on throughout the train as quick as they could possibly work, speaking now of the operation taking place within a very few seconds. That is what they thought had happened, but it wasn't. At any rate, pursuant to his duty and the order of the conductor, the brakeman Goneau took a wrench and an extra air hose they had in the caboose and got out of the caboose and walked up on what we will speak of as the north side of the train. It is the right hand side as you go towards the engine, looking along as he walked along to see if he could discover what the trouble was. Of course that would necessitate his watching between these cars. He walked along until he got up, as he understands it, near the middle of the train, probably about thirty cars, not quite half the length of the train. And when he got up near that point, he came to what will be spoken of here as an open bridge, a trestle bridge, a bridge that has no sides just like a trestle, the under-pinning and the under-support of the ties laid across and the rail on the ties. It was open ties. This bridge was over the St. Croix River. This is where the accident happened. When he came to that bridge he walked along on the end of the ties which are out beyond the car holding onto the car. He had passed [fol. 14] several cars on the bridge and of course necessarily looking to see what the trouble was. When he got to a point some twenty feet or such a matter on east of the west end of the bridge, he is walking west, there he found where the trouble was. The train had parted, had broken in two. That is what the trouble was and he found the two section of the train, say 30 cars back, 40 cars still connected with the engine, standing there some ten or twelve feet apart. And he went in to see what the trouble was. He found the coupler and the hose, of course, separated. When the car separated the hose separated; that is, when the cars part a couple feet the hose will part without breaking; those things are snapped together, if anything happens the hose snaps apart and the hose won't be damaged; found that coupler and the hose all right so far as it looked.

He came up to this car—and, by the way, it is dark at this time; it was real dark. Although it was only between six and seven o'clock, it was snowing and raining both. He comes up to this car, the east end of the last car of the forty car section attached to the engine, and finds that the coupler is broken down and is hanging instead of coming out straight from the car as it should, hung down, and the reason he saw at once as a trained railroad man that coupler had dropped down—here is the way a knuckle holds and when it dropped down they became uncoupled. The reason it dropped down was underneath, you have all seen these big couplers that come out of the end of the cars, lots of people speak of them as draw bars but the whole appliance there is the coupling apparatus; this big draw bar [fol. 15] comes out and it weighs, the whole appliance anyhow, two or three hundred pounds and it is held in position by an iron that is bolted underneath the sill of the car somewhere speaking generally, that iron being called the carrier iron, of course the one end that runs back under the car is held by something there. If that carrier iron becomes loose the big draw bar has to drop down. This carrier iron is about two feet long, speaking roughly, and, as the testimony will show, it was fastened in position by one three-quarter inch bolt on each end and the nut was gone on the bolt on the north end of this carrier iron which is on the side where Mr. Goneau was walking and he looked in there and saw conditions, nut was gone down there, threads were to a large degree stripped, not all of them, but the lower end of the bolt. Carrier iron dropped; of course it would drop down and instead of being at right angles across this way where it belonged, he found it had worked back under the draw bar so that the loose end was back under the draw bar and under the car and the draw bar was hanging down. That is what happened and the reason the train stopped, as the testimony will show, is that the very instant that car separated, the coupler dropped down and separated, of course the hose came apart and the instant the air escaped the brakes went on in emergency. That is the reason the train stopped.  was not the engineer or anybody else that stopped it.

Now, it was the duty of the plaintiff at that time, as the testimony [fol. 16] will show, if he could, to couple that train together again so they could get out of there, go on their journey, if possible. The testimony will show that before he could even undertake to couple the cars, get these two sections together again, he had to fix that broken coupler up in some way, so he went in between the cars working with his back towards the north side, the side he came up on; that is, generally speaking. He put his left knee under the end of that draw bar that had dropped down and raised it up as best he could, prying it up with his foot, so as to take the pressure off the carrier iron and so he could pull the carrier iron into its position at right angles to the draw bar again. He did that and he succeeded in getting the carrier iron around in position. His testimony will show that he had a nut in his pocket at the time, 7/8 inch nut, and he tried to see if he could put it on that bolt on the carrier iron, screw that bolt on, but the nut was too large. He did not have any other

and the carrier iron back in position again, that is at right angles, would not hold the draw bar up high enough so he could make a coupling that would amount to anything. So he hunted around with his lantern—he had a lantern—there along the track for these little wedges, shims we call them, where they level up the track and get these little sways out of them, and he found a number of those and he took them and worked at it till he got those in between the carrier iron in its crippled condition and the draw bar, till he got it up high enough so that he thought it would couple and might hold. Now, when he got that fixed up, this draw bar, being on that sloping [fol. 17] carrier iron, had a tip to it and it would not meet the good draw bar on the car east of him, that is the other section, so he went to that draw bar—these draw bars have a little side play—and he pulled that draw bar over so the two would meet in the proper way, and of course he opened the knuckles. You know what the knuckles are, open by pin-lifter levers; you have seen brakemen do it lots of times. That is another safety appliance you must have, these pin-lifter levers, on there so that men may couple cars and uncouple cars without ever being required to go between the cars passed for the safety and protection of these men. So he opened the knuckles. Now, he had to take another step there. At the end of each car where this air pipe comes out and where the hose connects, there is a valve with a handle, called an angle cock. When you are running your train as this train had been running you have to have the angle cocks all open so the air will have a free passage back through the pipe. But, in order to have the engineer back up when he got ready to make the coupling, he had to close the angle cock on that crippled car so the engineer could pump air into the train line and into the machinery in these cars and thereby release the brakes. So he closed that. Then he was ready and he went up on top of the train, went up on top of that car over there, the east one, because the ladder was on his corner there that he could climb up on, and he climbed up on top of that car and took his extra hose with him and his wrench and laid them on the running board up on that car and [fol. 18] took his lantern with him. Mind you, the engine was up forty car lengths away from him, in the dark and the rain, and when he gets up there he gives the back-up signal with his lantern, and as he gives that signal he sees the lantern of the head brakeman up somewhere near the engine on top of the train. It is the duty of the head brakeman to repeat the signal to the engineer, which he did. The engineer responded to that signal, not instantly, but as soon as he could get his brakes released, by backing up, the purpose of backing up being to couple these couplers together and make them hold if they could. The plaintiff remained in his position until they came back and the impact was made, two couplers came together, then he gave the stop signal; the lantern would be across the track at night. Engineer stopped. Then the plaintiff got down and coupled up the air hose, opened up the angle cock that he had already closed so that the engineer could pump the air through and release the brakes on the back section of the train, which of course remained set during all this time. It took quite a while, and at

this time the plaintiff went up on top of the train for the purpose of moving his train by giving the proper signals, but this delay made it, in his judgment necessary not to go ahead to the next station, Solon Springs, but to back up into the station known as Gordon and take a siding because he was then about on the time of the passenger train. And so when he got up he gave the back-up signal to go back into Gordon and, as his testimony will show, there [fol. 19] was jerking and it was hard to move that seventy car train, but it got started and it moved back some twenty or thirty feet further in east on the bridge and the fixed up coupler went down again and the train came apart that time about four or six feet, I think, and the hose separated and there he was again. So he goes down—and at this time I will not take time—for the purpose of repeating, fixing it again if he could. He found the carrier iron had come off and gone back under the draw bar the same way and so he put his knee under the draw bar again and raised it and pulled on the carrier iron. At this time the carrier iron stuck or didn't give, so he braced himself, as I think his expression was as he testified before, raised up on it harder, had hold of the carrier iron with his back out towards the north and both hands and gave it a hard pull, harder pull. I can imagine how he is going to testify, "I am going to get it this time." And that time it didn't stick at all and it threw him from his balance and he went backward and over beyond the bridge and to the ground underneath, striking on timbers on his way down.

Now, at this point I will state in this action the negligence that we claim to exist on the part of the railroad company is that at the time and place in question they had a coupler upon that car that was defective and out of order and which could not be used and which prevented the train being coupled together without the necessity of plaintiff going up there on the bridge in the dark, in the night and storm and fixing this defective coupler and getting it back, in order [fol. 20] to perform his primary duty of coupling the train together again, and that was the cause of this accident, because the defendant did not have a coupler as the law required. It is proper to say to you that the law requires this and all railroad companies to have those couplers in proper condition continuously; means no excuse is accepted. That is the case, gentlemen, so far as I need to go along that line. As I say, the defendant company does not deny that the coupler was defective, but they claim the accident happened in some other way, I should judge, from what Judge Spooner says. Now, the plaintiff has been over this bridge a good many times. His testimony will be merely an estimate, the best he could give it. He will testify that as he went off I think his right foot went down; when he lost his balance when that thing suddenly gave way, I think his testimony is his right foot went through on the ties or between a pair of ties on the bridge, but anyway—I am not sure of the details—he went off the bridge backwards, as I have told you. The end of the ties extended out possibly two feet or less beyond the side of the cars. I think he testified that, as he remembered, he whirled and his body struck against something, he doesn't know what, except the braces and things underneath the car, cross-arms, under-pinning standing out at sort of an angle.

Underneath the bridge, I mean, and struck on or about his left shoulder and left arm and left side and back, left hip. Then he doesn't know what happened.

\* \* \* \* \*

[fol. 21] Gentlemen, that is the case that will be presented to you. That is an outline, but I think you can follow it.

---

ERNEST J. GONEAU, plaintiff herein, in his own behalf, duly sworn, testified as follows:

Direct examination:

By Mr. Anderson: Your full name, please?

Mr. Palmer: If your Honor please, defendant understands from the complaint and the opening statement of counsel that this action is brought under the Federal Employers Liability Act, under the Federal Safety Appliance Act. At this time defendant objects to the receiving of any evidence under the complaint for the reason that it does not state facts sufficient to constitute a cause of action under either of the acts aforesaid, nor under any Federal Act.

The Court: The objection is overruled.

(To which ruling defendant excepted.)

Mr. Palmer: At this time the defendant further moves that, upon the pleadings and the opening statement of counsel for the plaintiff, the court direct the jury to return a verdict in favor of the defendant, on the ground that no cause of action is, under the Federal Acts aforesaid, pleaded in the complaint or shown to be claimed under the opening statement of counsel.

The Court: Motion denied.

(To which ruling defendant excepted.)

Mr. Palmer: At this time defendant further moves upon the [fol. 22] pleadings and the opening statement of counsel, that the action be dismissed for the reasons and on all the grounds heretofore stated.

The Court: Motion denied.

(To which ruling defendant excepted.)

Mr. Anderson: Your full name, please?

A. Ernest Joseph Goneau.

Mr. Anderson: In order to make the record and avoid forgetting it, I understood counsel for defendant, for the purpose of this trial, admit that defendant at the time of this accident was a common carrier by railroad, engaged in interstate commerce by such railroad, within the meaning of the Federal Acts.

Mr. Palmer: That is admitted, your Honor.

Mr. Anderson: Yes, and also that the plaintiff at the time this accident occurred was a brakeman upon and working about a freight train of the defendant which was then and there being operated and used in interstate commerce.

Mr. Palmer: That is admitted.

Mr. Anderson: And that the plaintiff was an interstate commerce employe at the time of the accident.

Mr. Palmer: That is admitted, your Honor.

Mr. Anderson:

Q. Where do you live, Mr. Goneau?

A. Superior, Wisconsin.

Q. How old are you at the present time?

A. Thirty-four.

Q. Where were you born?

[fol. 23] A. Black River Falls, Wisconsin.

Q. You are married?

A. Yes, sir.

Q. Have a wife and several children, I believe?

A. Yes, sir.

Q. The date of your accident was when?

A. October 27th, 1920.

Q. And at about what time in the evening?

A. Well, shortly after six o'clock.

Q. Admittedly, at that time you were in the employ of the Soo Railway Company, this defendant, as a freight brakeman?

A. Yes, sir.

Q. And how long immediately prior to that date had you been working as brakeman for the Soo Railway?

A. Almost four years.

Q. And all that time in and around and out of Superior?

A. Most of the time.

Q. Had you had other prvious railroad experience?

A. Yes, sir.

Q. How long altogether had you been employed by railroads?

A. Since 1912.

Q. In what capacity at the start?

A. Brakeman.

Q. And did you change your occupation after that with the railroads, work at something else?

A. No, sir, always a brakeman.

Q. Had some intermissions where you were not working after [fol. 24] you started in that occupation?

A. Yes, sir.

Q. How much of the time were you not working, about?

A. Well, I couldn't say exactly. It would not be very much time.

Q. Now, coming right down to the particular time, what freight train were you working on at the time of this accident?

A. They call it No. 43.

Q. And that was a west-bound freight train?

A. Yes, sir.

Q. Running from Chicago to Superior? I think that is admitted?

A. Yes, sir.

Mr. Palmer: Ladysmith to Superior.

Mr. Anderson: Well, I mean an interstate train, is all.

Mr. Palmer: Yes.

Mr. Anderson:

Q. With reference to trains running on this track in question, you railroad men speak of those trains as running in certain directions; now, how do you speak of it?

A. East and west.

Q. And trains running from Chicago towards Superior are spoken of as what?

A. Going west.

Q. And those going the opposite direction east?

A. East, yes, sir.

Q. I ask that because the track runs generally northwest and [fol. 25] southeast, is the general direction, isn't it?

A. Yes, sir.

Q. That would put the right hand side on the north, wouldn't it?

A. Yes, sir.

Q. Where did your crew, as a crew, take charge of this west-bound freight train?

A. Ladysmith, Wisconsin.

Q. That is a division point?

A. Yes, sir.

Q. Then your division run, you and your crew, was from Ladysmith to what city?

A. Superior.

Q. At what time did you take the train at Ladysmith and start out?

A. We were ordered to work somewhere about noon.

Q. And by that you mean you reported for work and went out when things were ready?

A. Yes, sir.

Q. When did you start with the train, about?

A. Somewhere between one and two o'clock.

Q. In the afternoon?

A. Yes, sir.

Q. Was the freight train when you got it as a crew made up or did you make it up there at Ladysmith?

A. It was almost all made up.

Q. What do you mean, as you remember, by almost?

A. Well, we done a little switching.

[fol. 26] Q. You put your own engine on, I suppose?

A. Yes, sir.

Q. The other crew that brought it into Ladysmith, did they put the caboose on?

- A. Yes, sir, they put our caboose on.
- Q. When you started out from Ladysmith how many cars did you have on the train?
- A. About seventy.
- Q. With the caboose on the rear end?
- A. Yes, sir.
- Q. And you had one engine?
- A. Yes, sir.
- Q. Who was your engineer?
- A. George Barnaby.
- Q. Who was your fireman?
- A. Price Manchester.
- Q. And who was your conductor?
- A. Sam Bailey.
- Q. And you were the rear brakeman?
- A. Yes, sir.
- Q. Took somebody's place that day, did you?
- A. Well, the regular man laid off and I took the rear end.
- Q. Before that you were working as head brakeman?
- A. Yes, sir.
- Q. And the head brakeman was who?
- A. Frank Rocheleau.
- Q. Anybody else on the train?
- A. No, sir.
- Q. You started out between one and two o'clock, as you remember it, in the afternoon?
- [fol. 27] A. Yes, sir.
- Q. Can you tell us about how far it was to Gordon?
- A. About seventy miles.
- Q. Any stops between Ladysmith and the scene of the accident?
- A. Two or three, yes.
- Q. Do you remember the places and the purposes? If so, state?
- A. We stopped for coal and water at Stanbery and I think we stopped for water at Weirgor. That is the first stop we made. And we met a passenger train or mixed train, but I don't remember where we met them.
- Q. So you had to take a siding for them?
- A. Yes, sir.
- Q. Any switching done after you left Ladysmith?
- A. No, sir.
- Q. So your train remained the same up to the time of the accident?
- A. Yes, sir.
- Q. Any stop at Gordon?
- A. No, sir.
- Q. At about what speed were you going through Gordon, in your best recollection?
- A. About twenty-five miles an hour.
- Q. And where were you and conductor Bailey as you were passing through Gordon?
- A. In the caboose.

Q. Was that your proper place?

A. Yes, sir.

[fol. 28] Q. Then as you were passing through Gordon did you have any duties at that time to perform?

A. No.

Q. Before you came into Gordon you were out on the rear platform of the caboose?

A. Yes, sir.

Q. What for, looking over the train?

A. Look over the train to see if there was any hot boxes.

Q. How far out of Gordon were you when anything happened?

A. The caboose was a little ways past the depot at Gordon.

Q. Do you know about how far the engine was from the Gordon station?

A. That would be almost a mile away, about a mile.

Q. Your train would be seventy cars, about how many feet to a car, how do you estimate cars?

A. About forty feet.

Q. Your train, then, was about 2,800 feet in length?

A. Yes, sir.

Q. What happened then as you knew at the moment the thing happened, what happened to your train?

A. The train stopped suddenly in emergency.

Q. Just explain to the jury what you mean by emergency?

A. Well, the brakes set as hard as they could and the train stopped very suddenly.

Q. What did you do when your train stopped?

[fol. 29] A. I got up to go to the rear end of the caboose to get an extra air hose.

Q. Did you have any talk with your conductor there about it?

A. The conductor says, "That must be an air hose."

Q. Did the conductor tell you to do anything?

A. He says, "You go up and see what the trouble is and I will take care of the rear end."

Q. The conductor is the man in charge of the train and the crew?

A. Yes, sir.

Q. What did you get?

A. I got an extra air hose and an S-wrench that we use a purpose for these air hose.

Q. Anything else?

A. Took my lantern and went out and started up towards the head end of the train.

Q. What side of the train did you go up on?

A. On the engineer's side, on the right hand side.

Q. That would be what you have spoken of already as the north side of the train?

A. Yes, sir.

Q. Will you tell the jury and the court what kind of weather it was at that time, first as to the light?

A. Well, it was quite dark when I started out. I had my lantern with me.

Q. Lit?

A. Lit, yes, sir, and it was snowing and kind of raining?

[fol. 30] Q. Little or much?

A. Quite a little bit at that time.

Q. Did that keep up or did it not until after the events that we are going to talk about, the rain and the snow?

A. I think it did.

Q. Were you on the ground all the way or did you get up on the train any time?

A. On the ground all the way.

Q. And as you walked along the side of the train what did you do?

A. Well, I was looking for defects or what was the cause of the train stopping.

Q. How did you do that?

A. By looking in between the cars and underneath as I went along going up toward the head end.

Q. And as you looked in between the cars what did you do?

A. Sometimes glanced in and stopped a bit; then again I kept on walking.

Q. Did you do any listening in connection with your looking for any burst air hose?

A. Certainly.

Q. And suppose there had been an air hose burst along there, what would you hear?

A. I would hear the air blowing out wherever it was bursted.

Q. How far up along the train did you get before you discovered anything out of the way?

A. About the middle of the train, I should judge.

[fol. 31] Q. The way you remember it it seemed about thirty-five cars?

A. Yes, sir.

Q. And what was there there at that immediate vicinity, whether it was ground, bridge or what, tell us?

A. It was on the St. Croix River bridge.

Q. About how long was that bridge?

A. Five or six car lengths.

Q. What kind of a bridge?

A. Wooden, open bridge.

Q. And how about the top upon which the track rested as to whether it was a flat top or whether it had sides or what?

A. Just a flat top.

Q. How about the surface as to whether it was solid or open ties?

A. Open ties.

Q. How far out from the side of the cars did the bridge extend?

A. About a foot and a half.

Q. Then you had to pass over the bridge, part way at any rate?

A. Yes, sir.

Q. How did you do it?

A. By hanging onto the cars and walking on the end of the ties.

Q. Where did you find the trouble with reference to the bridge, on what part of the bridge?

A. Near the west end of the St. Croix River bridge.

Q. How far in from the west end?

[fol. 32] A. About twenty feet.

Q. And when you speak of it being in twenty feet from the west end of the bridge, what are you speaking of, of the bridge proper?

A. Yes, sir.

Q. The structure or there is a fill beyond, isn't there?

A. Yes, sir.

Q. What did you find.

A. Well, I found that the train had parted. Broken in two.

Q. How far apart were the two sections of the train?

A. Ten or twelve feet.

Q. And had the air hose in between those two cars also separated?

A. Yes, sir.

Q. Did you then learn and know why the train stopped so suddenly?

A. Yes, sir.

Q. Why did it stop when the train separated?

A. The air set in emergency.

Q. What is there extending from the engine back to the caboose in a train like this used in connection with setting brakes, what do you call that?

A. Call it a train line.

Q. What is it made of, just the pipes themselves?

A. Pipes on each car and the hose on each end of the pipe?

Q. Iron pipe?

A. Yes, sir.

[fol. 33] Q. And the hose between the cars are made of what?

A. Rubber and canvas.

Q. About how long is one of those hose?

A. Two feet and a half or three feet.

Q. The hose is screwed on the end of the pipe of each car?

A. Yes, sir.

Q. And then what is there at the other end of the hose?

A. There is a metal coupling.

Q. How do you fasten them together?

A. Why, you pull it and then push down in there on that.

Q. About the way you had your hands?

A. Yes, sir.

Q. About as quickly if they work right?

A. Yes, sir.

Q. When the air hose are all connected up in that way and are of course in proper condition, what passes through that pipe and the air hose, what is in there?

A. Air from the engine.

Q. When you are running along, ordinarily how much pressure do they carry in the train line?

A. About sixty pounds.

Q. That is all connected with the air brakes appliances on the engine?

A. Yes, sir.

Q. Who operates the brakes?

A. Engineer.

Q. How does he do it, just generally?

[fol. 34] A. Well, he has a valve up there and when he puts the air in the train line it releases the brakes and when he draws it off or takes it out it sets the brakes.

Q. In other words, when air comes out of the train line it sets the brakes?

A. Yes, sir.

Q. And when he wants to release them he puts it in release position and pumps the air in?

A. Yes, sir.

Q. And if you let the air out suddenly, how do the brakes act?

A. They act quick.

Q. Set full power?

A. Yes, sir.

Q. What appliance is there at the upper end of the air hose?

A. Angle cock.

Q. What is that for?

A. That is to shut the air off and cut it in.

Q. When you turn it and close it the air can't get by?

A. Yes, sir.

Q. When it is open?

A. It gets through.

Q. And when you are running the train the angle cocks are all open, of course?

A. Yes, sir.

Q. How did you find the coupling appliance on the west end of the east car?

A. It was O. K. It was all right.

Q. How did you find the coupler on the east end of the west car [fol. 35] of this space?

A. Found it down.

Q. When in position what held that coupler up?

A. Carrier iron.

Q. Where was the carrier iron on this car?

A. The north end of it was down and it was swung underneath towards the head end of the train.

Q. Describe that carrier iron as best you remember it?

A. Well, a piece of flat iron about four inches wide and three-quarters of an inch thick, something like two feet long.

Q. When in position where was it with reference to the draw bar?

A. Cross-wise underneath the draw bar.

Q. And the draw bar is what?

A. Coupling, knuckle and pin and the carrier iron and draw bar.

Q. And the springs underneath there?

A. Yes, sir.

Q. About how long is the draw bar from the outer end clear back the whole length of it?

A. About three feet.

Q. And about how far out from the end of the car does the coupling end of the draw bar extend? That is how far from the sill?

A. A little better than a foot.

Q. And it is in that end that the knuckle is located?

A. Yes, sir.

Q. And the knuckle pin?

[fol. 36] A. Yes, sir.

Q. Then the lock pin that you lock the coupler when you are coupling?

A. Yes, sir.

Q. Then there is a pin lifter lever with an extension or chain attached to the lock pin?

A. Yes, sir.

Q. And that extends out to the corner of the car?

A. Yes, sir.

Q. Then the handle on the end?

A. Yes, sir.

Q. That is what you lift or open the knuckle with?

A. Yes, sir.

Q. And when you went to uncouple the car you uncouple with the pin lifter lever?

A. Yes, sir.

Q. All the time when they are in working condition?

A. In working condition.

Q. How is this carrier iron fastened to this car when in position?

A. It has bolts down through the end.

Q. How many bolts through each end of this carrier iron?

A. This carrier iron has one bolt on each end.

Q. How large a bolt?

A. Three-quarter inch.

Q. Did you examine the bolt on the north end from which the carrier iron had moved?

A. Yes, sir.

[fol. 37] Q. What shape did you find the threads in?

A. Found the threads battered and stripped.

Q. Did you find the nut?

A. No, sir.

Q. Then when the carrier iron came loose and went back what happened to the coupler or draw bar?

A. Draw bar dropped down and disconnected the coupler.

Q. How did that disconnect?

A. The carrier iron holds them up in position so the knuckles fit together and when this one dropped down, why, they disconnected.

Q. It dropped down and slid down so they didn't connect any more?

A. Didn't connect any more.

Q. When you found the coupler in that condition you may state whether or not the coupler was in such condition that you could couple up that train?

A. No, not unless I fixed it.

Q. What was your duty at that time as brakeman?

A. Repair it and get the train going.

Q. Was it your duty to make that coupling if you could?

A. Make the coupling and get the train going, yes, sir.

Q. And what were you doing then all the time you were there, what were you trying to accomplish at the final account?

[fol. 38] A. To get the train coupled up again so we could get it moving.

Q. What did you have to do, what did you do to that coupler on the west car in order to make the coupling?

A. I had to get the carrier iron back cross-ways underneath the draw bar.

Q. Did you do it?

A. Yes, sir.

Q. How did you go about it to do it?

A. I put my knee in under the draw bar, took the weight off the draw bar, and got hold of the carrier iron.

Q. The weight off the draw bar or off the carrier iron, which?

A. Well, off the carrier iron, raised up on the draw bar with my knee and pulled the carrier iron back cross-ways.

Q. What position did you take in doing that work?

A. Kind of squatted down.

Q. Where was your back?

A. Towards the outside of the bridge.

Q. North?

A. Yes, sir.

Q. Which knee did you have under the draw bar?

A. My left knee.

Q. And did you take hold of the carrier iron with one hand or both?

A. Well, I couldn't say for sure.

Q. Don't remember that?

A. I think possibly one hand.

[fol. 39] Q. Have any trouble in moving the carrier iron back to its original line at that time?

A. No, sir.

Q. When you got it back that far and as it rested there, was the draw bar then high enough to make a coupling and hold it all?

A. No, sir.

Q. What did you next do to try to get the coupler up where it would couple?

A. I went out on the end of the bridge.

Q. Didn't you do something else first?

A. Oh, I tried that nut on there.

Q. What did you do?

A. I had a nut in my pocket and I tried that on the bolt and it was too large, seven-eighths inch nut.

Q. What did you do then, trying to get that coupler so it would couple?

A. I had to get a couple block. I went out to the end of the bridge, called shims, to put in between the carrier iron and the draw bar in order to raise it up.

Q. By the way, how much did you raise that draw bar with those blocks, as nearly as you can remember, in inches?

A. Well, two inches and a half.

Q. When you got it that high was it then, in your judgment, high enough to make the coupling?

A. Well, about half a coupling.

Q. How long is the lip of the knuckle?

A. About six or seven inches.

Q. How high up did you get the draw bar by putting the shims [fol. 40] under?

A. About half way.

Q. So you got a half a grip on it?

A. Yes, sir.

Q. And when you got that done were the draw bars then in proper alignment?

A. No, sir.

Q. What did you have to do to get them in alignment?

A. Well, I had to push the one I was working on, the bad order one, over away from me and go back to the other one and open the knuckle and pull it towards me.

Q. And did you have to pull both knuckles open at this time?

A. No, sir.

Q. Which one did you leave open to make the coupling?

A. The good one.

Q. On the good car?

A. Yes, sir.

Q. Ordinarily, in making couplings, one knuckle open is proper, is it?

A. Yes, sir.

Q. In doing this work from the time you got up there and discovered the trouble, state whether or not you could do anything there towards fixing this coupler without going between the cars?

A. No, I could not.

Q. When automatic couplers are working properly, do you have to go between the cars at all to couple or uncouple?

[fol. 41] A. No, sir.

Q. What was the next thing you did, as you remember, after you got the draw bars lined up?

A. I closed the angle cock on the head end.

Q. That is on the crippled car?

A. Yes, sir.

Q. What was your purpose in doing that?

A. So the engineer could pump up the air and release the brakes.

Q. Could the brakes be released without your closing that?

A. No, sir.

Q. When you got the angle cock closed what did you do next?

A. I picked up my extra air hose and wrench and climbed up.

Q. Did you have anything else with you?

A. Lantern. Climbed up on the car, the first car or last car.

Q. That is the east car of these two cars we are talking about?

A. Yes, sir.

- Q. Which corner did you climb up on?
- A. On the right hand corner.
- Q. That is the north side?
- A. Yes, on the north side.
- Q. Why did you go to that corner?
- A. Because the ladder was there.
- Q. That is, on these freight cars do you have ladders on diagonal corners?
- A. Yes, sir.
- Q. And the ladder on the front end is that always on the right [fol. 42] hand front end?
- A. Yes, sir.
- Q. And the other is on the——
- A. The other side.
- Q. Left hand back end on the other side. What did you do when you got up on top of the car?
- A. Put my air hose and wrench on the running board and gave a back-up signal.
- Q. With what?
- A. With my lantern.
- Q. What was that, give us the motion, back-up signal?
- A. Circle with the lantern.
- Q. And as you were giving that back-up signal which way were you looking?
- A. Towards the engine.
- Q. And what did you see along there anywhere?
- A. I saw a white lantern up on top of a car.
- Q. As a railroad man you knew who that was?
- A. Yes, sir.
- Q. Who was that?
- A. Rocheleau.
- Q. Where was he when you gave this first back-up signal that you have told about?
- A. He was on top of the cars towards the engine, near the engine.
- Q. What did he do?
- A. He repeated the signal.
- Q. And was the signal responded to in time?
- A. Yes, sir.
- Q. Right away or some little time afterwards?
- [fol. 43] A. Well, it was a little while before the brakes were released.
- Q. And what did you give the back-up signal for?
- A. To make the coupling.
- Q. Did he back up in time?
- A. Yes, sir.
- Q. And was there an impact?
- A. Yes, sir.
- Q. What did you do then or about then?
- A. After the impact I came down.
- Q. No, what other signal did you give, anything?
- A. I gave a stop signal.

Q. That is with the impact?

A. Yes, sir.

Q. Gave the stop signal how?

A. Swung down with your lantern.

Q. Now, you swing your lantern across the track, or across the train?

A. Across the train.

Q. Did Rocheleau repeat that stop signal?

A. Yes, sir.

Q. Did the train stop?

A. Yes, sir.

Q. Were the brakes set or released on the east section of your train at that time?

A. They were set.

Q. Was there any way to release them until your train was coupled up?

A. No, sir.

[fol. 44] Q. Then you started to say you climbed down then?

A. I climbed down.

Q. Where did you go?

A. Went in between.

Q. And what did you find as to the two couplers?

A. I saw the coupling had made.

Q. Yes.

A. That is, a fairly good joint or coupling.

Q. Half a coupling anyway?

A. Yes, sir.

Q. And what did you do, if anything, with the air hose?

A. I coupled up the air hose.

Q. What did you do with the angle cock you had already closed?

A. I opened the angle cock.

Q. Do anything else down there then?

A. No, sir.

Q. Where did you go then?

A. I climbed back up on the same car again.

Q. And when you got up on top what did you do?

A. I gave another back-up signal.

Q. Where were you going then, if you could go?

A. Going back into Gordon.

Q. Tell the jury and the court why you were going back into Gordon instead of going ahead? When you were running along with nothing happening, did you have time to make Solon Springs under your time card?

[fol. 45] A. Yes, sir.

Q. Did you have time, in your judgment, after you got this thing fixed up and coupled?

A. No, sir.

Q. What was your duty then?

A. To back up into Gordon to get in on the second track.

Q. To let the passenger train go by?

A. Yes, sir.

Q. Is that what you were going to do?

A. Yes, sir.

Q. How far back did your train go on this occasion?

A. About twenty feet.

Q. Backed up easily or roughly or how?

A. No, the engine slipped and we went by jerks.

Q. Then what happened to the train when you got back there twenty feet or such a matter?

A. I heard the air hose pop again and separated again.

Q. How far did the train part on this occasion?

A. About four feet.

Q. When you say about four feet what do you mean by that, four feet between the cars when they stopped or four feet farther than when they are coupled together?

A. About four feet farther than when they are coupled together.

Q. How much space between the cars when they are coupled together, about?

A. Two feet and a half.

Q. There was about six feet or thereabouts between the cars, then?  
[fol. 46] A. Yes, sir.

Q. Did you get down and look the coupler over again?

A. Yes, sir.

Q. Now, what condition did you find this coupler in when you got down on this occasion?

A. The same as it was before.

Q. Carrier iron back as far as it was before?

A. Yes, sir.

Q. Air hose separated?

A. Yes, sir.

Q. And what did you then proceed to do?

Q. To fix it up again.

Q. So as to make another coupling?

A. Yes, sir.

Q. How did you go at that then?

A. Went back underneath, put my knee under the draw bar to help raise it up and got hold of the carrier iron to pull it back crossways underneath the draw bar and it stuck, wouldn't come; it was caught some way or other. The next time I kind of braced myself for a harder pull on it.

Q. On this last occasion, the harder pull, did you have one or both hands that time?

A. I had taken two hands then. And I raised up a little harder with my knee and give it a hard pull and it came easy. Caused me to step back down in between the ties.

Q. Which foot?

A. Right foot. Or the stringer somewhere, stepped back, lost by [fol. 47] balance and I made a grab for the car and I missed it and went off backwards. I hit on my back and side.

Q. Which side, please?

A. Left side. Then I remember wriggling around and falling again probably five feet.

Q. When you were doing this work fixing the coupler were you between the cars?

A. Yes, sir.

Q. Could you fix it otherwise?

A. No, sir.

Q. Were you fixing at that time for the purpose of making another coupling?

A. Yes, sir.

Q. What did your back, shoulder and back and side strike when you went down?

A. Some of the timbers underneath the bridge.

Q. Were you conscious enough to tell us about what you were lying on when you made that wriggle and fell off?

A. Well, I imagine some of the timbers on there, cross arms or something.

Q. Have you been over that bridge a good many times?

A. Yes, sir.

Q. And, in your best judgment, how far was it from the surface of the bridge to the point where you first stopped before you made a second fall?

A. Fifty, sixty feet, something like that.

Q. You don't mean fifty or sixty feet down?

A. No, about thirty feet.

Q. Then you say you went down four or five feet further, you think?

[fol. 48] A. Yes, sir.

Q. That last fall I don't suppose hurt you much?

A. I don't remember.

Q. As you sit there do you remember everything from the time you went off the bridge or are there times that you cannot remember what occurred?

A. I could not remember what occurred only at times.

Q. What is the next thing you remember down there under the bridge?

A. Well, I remember of picking a clot of blood off my chest or neck and throat here.

Q. How big?

A. Oh, about as big as a hen's egg.

Q. Come from your mouth, did it?

A. Yes, sir. Kind of a spongy stuff, come from my mouth, yes, and I threw it on the ground.

Q. What else do you remember down there?

A. I remember asking Rocheleau for his mackinaw. I was cold.

Q. That is the head brakeman, after he got down there?

A. Yes, sir.

Q. Do you remember anything about any lights or things before that?

A. Yes, sir, I saw a light up on top of the cars or up on the bridge and I tried to call out to them.

Q. Could you call, make a word?

A. No, sir, just a groan.

Q. Do you remember who came to you first at all?

[fol. 49] A. No, sir.

Q. Did Rocheleau give you the mackinaw you are speaking of?

A. He threw it to me. I don't remember whether I got it onto me or not.

Q. And do you remember what you did down under the bridge before they carried you out?

A. No, sir.

Q. Do you remember anything about whether you got up and walked around or anything?

A. No, sir. I don't remember whether I did or not.

Q. Do you remember about being carried out?

A. Yes, sir, I remember something about being carried up the bank.

Q. Do you know what you were put into when you got up there?

A. In a chair.

Q. You mean outside the car or inside?

A. No, inside the car.

Q. What car were you carried into?

A. Into the baggage car, passenger.

Q. It wasn't your freight train?

A. No.

Q. The passenger train was standing up above the bridge?

A. Yes, sir.

Q. Where were you taken?

A. To the Gordon station depot.

Q. Did you walk out or did they carry you out?

A. Carried me out in this chair.

Q. And put you in the waiting room?

[fol. 50] A. Yes, sir.

Q. Do you remember whether they put you on your freight train to take you to Superior or not?

A. I remember of them taking me out of the depot and putting me in the caboose.

Q. That is your caboose?

A. Yes, sir.

Q. What occurred there in the station as to yourself, if you remember?

A. I threw up on the floor.

Q. Any blood?

A. Yes, sir. Lots of blood.

Q. How far back does your memory go as to your pain and suffering, do you go back to the bridge or not?

A. I don't remember.

Q. Can you remember anything about how you felt under the bridge?

A. I knew I was in awful pain.

Q. When can you give us any location of pain, at the station, in the waiting room, can you give us now from memory how you felt there?

A. No, I cannot.

Q. Except you were in awful pain?

A. Yes, sir.

Q. They took you to the hospital at Superior, I suppose?

A. Yes, sir.

Q. What do you remember about the trip on the train up there?

A. I don't remember any of it.

Q. How far was it to Superior?

[fol. 51] A. Thirty-nine miles.

Q. Do you remember how you got off the train and got to the hospital?

A. No, sir.

Q. Do you remember about a doctor going up with you from Gordon?

A. No, sir, I don't remember about it.

Q. Whether he did or not you don't know?

A. No.

Q. Where were you and when was it that you remember anything so as to tell us in detail?

A. Well, it was three or four days after the accident, after I was in the hospital.

Q. Do you remember about anybody being there, who it was or anything?

A. I remember the priest at the hospital, something about that.

Q. Now, when you remember and can tell us about it, I wish you would tell us as carefully as you can where you suffered pain and designate the places as best you can by names?

A. Well, it was in my back here (indicating).

Q. In your back on which side?

A. On the left side. And my chest, my left arm——

Q. Wait a minute, chest, which side?

A. Left side.

Q. Go on?

A. And left arm and shoulder and my back and hip. Left hip.

Q. Any other pains anywhere?

A. It was all on that side, on the left side.

[fol. 52] Q. Now, when, if at all, did you begin to cough?

A. I noticed it after I was in the hospital a few days.

Q. Little or much at that time?

A. A lot.

Q. How long did the cough continue so as to be what you might say a lot or persistent?

A. Well, most all summer, the next summer. Five or six months.

Q. Take the left side of the chest and side first, how much did it hurt?

A. Well, it hurt so I could not bear it.

Q. Did they have to treat them, give you injections to lessen the pain?

A. Well, they gave me shots in the arm.

Q. How long did they continue doing that?

A. Something for about six weeks.

Q. How about your breathing?

A. Well, it hurt me terribly to breathe, my left chest.

Q. What kind of breathing did you do there while you were at the hospital?

A. Well, any breath at all hurt me.

Q. Could you draw a long breath there?

A. I don't remember of trying that.

Q. Filling up, I mean?

A. No.

Q. I suppose you just breathed short, anyway?

A. Yes, sir.

Q. How about the shoulder and arm?

A. Had an awful pain in my shoulder and arm.

Q. Where were the pains in the shoulder?

[fol. 53] A. Oh, pain from the shoulder all down to the end of my fingers.

Q. Were there any pains in the shoulder proper, that is what I mean?

A. Yes.

Q. The pains you spoke of now were from the shoulder down to the end of what fingers?

A. Little finger and the next one and part of the next one.

Q. And what kinds of pains were those?

A. Why, stinging pains, numbness like.

Q. Were the pains continuous or worse at times, intermittent?

A. They were awful bad after the accident.

Q. How long did they remain awful bad, as you speak?

A. About three months.

Q. When you say left hip where do you mean the pain was?

A. Well, about the middle of my back on the left side; only a little bit in the hip, down the cords of my legs and back in the groin here (indicating).

Q. Which groin hurt?

A. My left groin.

Q. What did you say about the leg?

A. Back of my left leg.

Q. How far down?

A. Well, all the way down.

Q. How long were you at the hospital?

A. Two months.

Q. Did you then go home at your own request?

A. Yes, sir.

[fol. 54] Q. They did not discharge you, send you home?

A. No, sir.

Q. Now, at the end of that two months in the hospital, how was your leg feeling and hip?

A. It was almost impossible for me to walk.

Q. When did you first get your left leg down on the floor to put weight on it?

A. The last week I was in the hospital.

Q. And how much could you walk then?

A. Very little.

Q. Could you take a step without support at that time?

A. No, sir.

Q. State whether or not it hurt you, in these regions around the hip and the back when you walked around at that time?

A. Yes, I had extreme pain in my hip and leg there.

Q. What was the occasion of that walk, where did you go?

A. To the toilet.

Q. How far did you walk then?

A. About fifteen feet.

Q. Each way?

A. No. I walked to the toilet and I got faint and weak and had to holler for help and they helped me back.

Q. So you were not able to get back to your bed?

A. No, sir.

Q. Without help. And then at that time when you were getting [fol. 55] out of bed did you swing your legs out yourself?

A. No, sir.

Q. How did you get your legs out of the bed?

A. The nurse would lift them out.

Q. How long was this before you left the hospital at the end of the two months that you are speaking about going to the toilet?

A. During the last week I was in the hospital.

Q. Had you been out of bed before that?

A. Yes, a little bit.

Q. For what purpose?

A. Sitting in a chair.

Q. While they were making the bed or sitting up because you wanted to?

A. Sitting up because I thought I would gain strength a little better.

Q. When was the first time they got you out of bed into a chair?

A. Something like three or four weeks after the accident.

Q. Then after that did you get up each day, did they get you up and put you in the chair?

A. No, I didn't try it again then for about two weeks.

Q. Then you tried it again?

A. Yes, sir.

Q. How did it affect you?

A. Well, I couldn't hardly sit up more than ten minutes.

Q. During those two months in the hospital, how did your heart behave itself as you observed it?

A. Well, it pained me to breathe and the least little bit of exer- [fol. 56] tion I would get dizzy and weak and I could not lay down flat because my heart—that is where it give me the pain. I had to sit up in a sitting position all the time.

Q. Any palpitation or rapidity?

A. Yes, when I would get up my heart would beat harder.

Q. Taking this occasion when you attempted to go and did go to the toilet room, how did that affect your heart action?

A. That made it thump; made it work faster.

Q. How about at the end of the time you were in the hospital, was the heart action different, any better?

A. About the same all the time.

Q. Were you suffering much pain around the chest when you left the hospital?

A. Yes, sir.

Q. When you left the hospital to what extent could you use your left hand and arm?

A. Could not use it to amount to anything.

Q. Could you feed yourself?

A. I didn't use my left hand at all.

Q. Well, could you use it?

A. I could raise my arm up, but it pained me so that I wouldn't do it.

Q. What did the doctor do to the arm while you were there?

A. They rubbed something on there. I don't know what it was.

Q. What did they do around your body where you had these pains in your chest?

[fol. 57] A. Put tape around me.

Q. How long did you have that on?

A. Well, after they took the X-ray about two days after the accident.

Q. Was there anything on there before they took the X-ray?

A. There was.

Q. When did they put this on, if you know?

A. Well, I noticed it on there after——

Q. You began to remember?

A. Yes.

Q. They took an X-ray, then what happened?

A. Then they took it off.

Q. Never put it on again?

A. Not only two or three strands they put on once afterwards.

Q. Was it just two months after you were hurt that you went home?

A. Just about two months, yes, sir.

Q. How did you get out of the hospital?

A. My brother and a friend helped me out of the hospital.

Q. Well, did you help yourself, too, I suppose?

A. Well, yes, they balanced me, one on each side, partly carried me.

Q. Did you use that left leg any?

A. Not to amount to anything, no, sir.

Q. How was it feeling then?

A. So I couldn't hardly use it.

Q. Was it hurting or what?

A. Yes, sir, hurt me in my left hip.

Q. You went home in an automobile?

[fol. 58] A. Yes, sir.

Q. How far did you live from the hospital?

A. Five blocks.

Q. Paved street?

A. Well, all but two blocks.

Q. Was that rough to ride over it?

A. No.

Q. How did you get into the house?

A. My brother and a friend helped me in the house.

Q. Where did you go after you got in the house?

A. Went to bed.

Q. Upstairs or down?

A. Downstairs.

Q. Up to this time that you had gone home had you been up and down any stairs at all?

A. Only when I came out of the hospital we went down four or five steps when I was coming home.

Q. Four or five steps outdoors?

A. Yes, sir.

Q. When you came down you came down in an elevator, I suppose?

A. Yes, sir.

Q. How did you feel when you got home and got to bed?

A. Well, I was all in. I was sick, weak, dizzy.

Q. Used you up?

A. Used me up, yes, sir.

Q. Did you notice anything about the way your heart acted when [fol. 59] you went down and got into the automobile and got out and went home and got into bed?

A. Yes, sir.

Q. How did your heart act?

A. Well, the excitement and the going down it pounded, hurt me made me dizzy and weak, give me more pain.

Q. Was there any pain in connection with that pounding of the heart?

A. There was more pain, yes, sir.

Q. How long did you stay in bed after you got home before you tried to get up and walk again?

A. About two weeks.

Q. And then you got up and from that time on you walked, I suppose, from time to time?

A. Well, I got up and sat around in a chair and went back to bed, between the chair and the bed.

Q. Can you tell us about when was the first time you went outdoors and on the sidewalk and walked any distance?

A. Something like about two months after I was home.

Q. When did you get a cane?

A. Got the cane about the time I started getting up out of bed two weeks after I come from the hospital.

Q. And you used that cane until when?

A. Well, till this last summer, most all the time.

Q. This last summer would be the summer of 1922?

A. Yes, sir.

[fol. 60] Q. When did you get out and take a walk of two or three or four or five blocks?

A. Well, that was something like four months after the accident.

Q. How far did you walk the first time you got out on the street to take a walk?

A. Oh, I don't remember. It wasn't very far. I would just go a little ways and then back again.

Q. And then you kept on walking so that you could take longer walks after that, I suppose?

A. Yes, sir.

Q. Take it now in the year 1921, along in the spring, that is some six months or seven months after you were hurt and when you would be walking where you took several blocks walks, how did you get along in breathing?

A. When I would walk I would get dizzy and caused me to have pain in my chest so that I would have to stop and take a rest to get my breath; get out of breath.

Q. Did you have pain when you were sitting around at that time, in the spring of 1921?

A. Yes, sir, some.

Q. Were you ever free from pain in your chest?

A. No, sir.

Q. Well, are you now?

A. No, sir.

Q. Take it at that time, down as far as September, nearly a year after you were hurt, how far could you walk now, right along with the slow gait and with the help of your cane how long a walk could you take and did you take?

[fol. 61] A. About ten or fifteen blocks up town; that is the longest walk I took.

Q. How did that affect you, how did you get along?

A. Well, it put me all in. Tired me out.

Q. You have given different parts that were troubled, how did it affect those parts?

A. Hurt my hip and back, caused more pains in my chest and breathing.

Q. Up to the last trial a year ago last September did you have occasion from time to time after you got out and were walking to have to make quick movements, exert yourself a little more than the ordinary?

A. Yes, sir.

Q. How did it affect your heart?

A. Well, it would make more pains in my heart and it would pound, start beating faster.

Q. And could you fill up your lungs with air and let it out again without pain?

A. No, sir.

Q. Did you try it sometimes?

A. Yes, sir.

Q. Could you do it, could you fill up your lungs?

A. I can't do it now unless it hurts me.

Q. Are you short of breath when you move and work, get around to do anything?

A. Yes, sir.

Q. We will take it at the present time; it is now a year and a half after the other trial, how about that left arm?

A. Well, it hasn't got a third of the strength that the right arm [fol. 62] has and I still have pain in it when I try to use it and if I try to hold something it cramps on me.

Q. What cramps?

A. The fingers of the——

Q. All of them?

A. Of the left hand, yes, sir.

Q. Have you got any pain in the arm if you sit quietly or not?

A. Sometimes it does catch me; a little pain.

Q. Where?

A. Seems to run from my shoulder blade up through my shoulder and down through the arm.

Q. Where does it go in your hand particularly?

A. This little finger and half of the ring finger.

Q. Have you since the last trial lifted things with that left hand?

A. Some little things, yes.

Q. What have you done with it?

A. I have taken an ax and chopped kindling.

Q. How did you chop, left handed or right handed?

A. Right handed.

Q. I want to know how often have you cut kindling wood to build your fires?

A. Very seldom I do.

Q. Have you done it sometimes?

A. I have done it sometimes.

Q. Tell us how you get along doing that kind of work?

A. Well, I could not use an ax to amount to anything with that hand.

Q. Did the jarring hurt any?

[fol. 63] A. The jar is what hurt; hurt the whole arm.

Q. Could you tell about the strength in your arm in doing that work?

A. I didn't have enough strength to do it very good.

Q. In the summer of 1921 up to the time of the last trial your left hand continued to get some better, didn't it, for a while?

A. It did, yes, some.

Q. Is this left hand any better and stronger and more useful now than it was when you tried your case in September, 1921?

A. No, sir.

Q. Did you notice any change in it?

A. No, sir, if anything, it is not as strong as it was.

Q. Can you tell whether your left hand is as big around now as your right?

A. It is smaller in size.

Q. Is the little finger smaller?

A. Yes, sir.

Q. Is your left arm as big as your right arm?

A. No, it isn't near as big.

Q. Before this accident happened was your left arm as big as your right arm?

A. I should judge so.

Q. Anything ever happen to that left arm before this accident?

A. No, sir.

Q. Anything ever happen in the way of an accident or an injury to your heart, chest or lungs or anything.

[fol. 64] A. No, sir.

Q. Or to your back and hip?

A. No, sir.

Q. By the way, did you ever have an accident before this time?

A. I had a little accident.

Q. When?

A. 1919, I believe it was.

Q. What was hurt then?

A. I skinned my leg or got it squeezed.

Q. Which leg?

A. Right leg down here at the shin.

Q. Railroading?

A. Yes, sir.

Q. How long did that bother you?

A. I was laid up a month with it.

Q. Never had any trouble with it afterwards?

A. No, sir.

Q. Any other accident did you ever have?

A. No, sir.

Q. Have you ever been sick?

A. Not to amount to anything, no, sir.

Q. What do you mean by not to amount to anything?

A. Had the "flu" in 1919, laid up a week with it.

Q. What else?

A. Had the measles and mumps when I was a boy.

Q. Did you have those the logical time when you were a kid?

A. When I was a boy, yes.

Q. Did you get all over those things?

[fol. 65] A. Yes, sir.

Q. Is that all the sickness you have ever had except a cold once in a while?

A. Yes, sir.

Q. Ever laid up with the fever or anything?

A. No, sir.

Q. How much did you weigh and what is your normal weight before this accident?

A. Around 155 or 60 pounds.

Q. Were you regular in your weight?

A. Quite regular, yes, sir.

Q. And have you weighed recently?

A. Yes, sir.

Q. Where are the scales that you weighed on?

A. At Duluth?

Q. Dr. Webster?

A. Yes sir.

Q. In his office?

A. Yes, sir.

Q. That is when I told you to go over there for an examination?

A. Yes, sir.

Q. About a week ago?

A. Yes, sir.

Q. How much did you weigh then?

A. 140.

Q. How do you feel now, are you heavier, about the same weight or what, as you were in September when this case was tried before?

A. Not as heavy now.

Q. Take it at the present time, Mr. Goneau, when you go to bed at night to sleep, how do you get along?

[fol. 66] A. Well, I don't sleep hardly any unless I get tired, very tired; then I got to sit up, propped up in the bed.

Q. How do you sleep in bed do you sleep on the ordinary one pillow proposition, the way you did?

A. No, sir, four or five pillows, kind of a sitting position.

Q. Can you sleep lying down in the normal way?

A. Not unless I get awful tired, awful tired.

Q. Why not?

A. Because it hurts me in my chest and I can't breathe good. It chokes me.

Q. Do you mean to say that is the way it is now? When you go to bed tonight do you have to prop up?

A. Yes, sir, do it right along.

Q. Do you do it because it is a habit or have you tried the other way to see if you can do it?

A. Tried the other way and I can't go to sleep.

Q. If you lie that way for quite a while, down flat, how about your breathing?

A. Well, I can't breathe so good. It hurts me more.

Q. Your appetite, I suppose, is fairly good?

A. Yes, sir.

Q. Well, has that left arm improved any since the last trial?

A. No, sir. If anything, it isn't as well as it was then.

Q. And can you see any improvement in your ability to exert yourself?

[fol. 67] A. No, sir.

Q. As to your lungs or heart or anywhere around the chest?

A. No, sir.

Q. But you have taken longer walks since the last trial than you did before?

A. Yes, sir.

Q. Did you go hunting sometimes?

A. Last fall.

Q. What were you hunting for?

A. Deer.

Q. How far out from Superior did you go?

A. Went out to Iron River, Wisconsin, about forty miles.

Q. You didn't walk down there, did you?

A. No, sir.

Q. Went down by train?

A. Went down in an automobile.

Q. How many times did you go hunting?

A. Four or five times, four or five days, different days.

Q. How close together, the four or five different times?

A. Well, I would hunt a day and then I would lay off two or three days.

Q. How far is the longest continuous walk you took after you got down to the hunting place, wherever it was?

A. About five miles. That was the hardest day.

Q. You walked five miles?

A. About five miles.

Q. Was that a rapid walk or a slow walk?

[fol. 68] A. Well, depend on the lay of the ground. If I was going up hill I would have to stop and rest and take it easier. Going down hill I would walk a little faster.

Q. Was that a continuous walk?

A. No, sir.

Q. How many times did you stop and sit down in that five miles?

A. I couldn't say, but I was most all day walking the five miles.

Q. When you stopped would you be stopping in connection with your hunting proposition?

A. Well, I would stop to rest most of the times. After I walked a ways I would stop to rest.

Q. When was this?

A. This was last fall. November, I believe, is the hunting season.

Q. What was the farthest you found yourself able to walk then without stopping and resting?

A. I couldn't say exactly, but I probably walked a half a mile.

Q. And you say you had to climb up banks and things different times?

A. Yes, sir.

Q. Can you tell this jury of anything more there so you can tell what effect that had on your heart and breathing apparatus?

A. Yes, sir, I would get short of breath. I would have to stop to catch my breath.

Q. Did your heart do anything?

A. Yes, sir, pounded harder; give me more pain.

Q. I won't ask you if you got any deer; I suppose you did?

[fol. 69] A. Yes, sir.

Q. You say you went four or five times hunting?

A. Yes, sir.

Q. Well, now, that was last fall, 1922?

A. Yes, sir.

Q. Did you go hunting in the fall of 1921 after the trial of this case?

A. I went down to the hunting grounds, but I didn't do any hunting.

Q. Why not?

A. Because I wasn't able to get around.

Q. Well, you went hunting in 1922; is that because you felt better in 1922 than you did in 1921 in the fall?

A. Not necessarily, no.

Q. Well, what are the facts?

A. Because I wanted to go pretty bad and I——

Q. Just went?

A. Braced myself up to go.

Q. Well, when you got over those hunting trips did you feel better?

A. No, sir. Put me all in; laid me out.

Q. Had you been a hunter before you got hurt?

A. Yes, sir.

Q. That was one of your means of fun in the fall, was it?

A. Yes, sir.

Q. That left hip and back—how is that at the present time?

A. Well, I can handle it better. It isn't any better, I don't believe, than it was.

[fol. 70] Q. When did you stop using a cane?

A. Well, this last summer, along in July sometime.

Q. Stopped using it because your leg was getting so you could handle it better?

A. Yes, sir.

Q. In the last trial you could walk without your cane?

A. Yes, sir.

Q. What was the reason you used your cane, I mean in 1921, what did the cane do to you, how did it help you?

A. Helped me to take the weight off my hip, my leg.

Q. How about jars or anything of that sort?

A. And the jars, too.

Q. By the way, does it affect that leg when you are walking along and step down into some little low place unexpectedly? Does it hurt?

A. I will say it does.

Q. You have been examined by different doctors here recently?

A. Yes, sir.

Q. Dr. Webster, Dr. Drechsler and Dr. Jamison?

A. Yes, sir.

Q. Those doctors raised your leg up?

A. Yes, sir.

Q. And the knee towards your chest?

A. Yes, sir.

Q. Twist it around?

A. Yes, sir.

[fol. 71] Q. Hurt?

A. Yes, sir.

Q. Now, take your left leg at the present time, is it any better when you come to the proposition of walking than it was a year ago?

A. No, sir, only that I can handle it better. More used to it.

Q. Can you walk without the limp that you have here?

A. I don't believe I could, no.

Q. Can you walk up a flight of stairs, put your right foot up on a step and your left foot upon the next step, without having hold of the banister?

A. No, if I am not holding on I always put my right foot ahead and step up with my left foot. I can do it, but it hurts me awful.

Q. You say when you step up with your right foot and then your left, where do you put your left foot when you have it follow your right?

A. On the same step.

Q. Is there any improvement in that respect in going up and down stairs?

A. No, sir.

Q. Or since the last trial?

A. No, sir.

Q. Do you have any pain as you are sitting now or at the hotel or in your home in your back or hip?

A. Not when I keep my leg straightened out.

Q. But you have been walking on this leg, you take exercise every day?

A. Yes, sir.

[fol. 72] Q. Day in and day out, about how much in the way of walking do you do?

A. Well, I probably average half a mile a day altogether.

Q. Have you attempted to walk rapidly to see what effect it would have on your heart from time to time?

A. Yes, sir.

Q. What does it do?

A. Makes me faint and dizzy.

Q. How about the heart beat?

A. It makes it beat faster.

Q. Do you see any improvement in that respect at all?

A. No, sir.

Q. Any improvement around your lungs?

A. No, sir.

Q. Have you done any work since you were hurt?

A. Not to amount to anything.

Q. That is, wage earning work?

A. No, sir.

Q. When have you and under what circumstances have you earned any wages since you were hurt in October, 1922?

A. The only money I did earn was keeping time for a fellow shoveling snow for the city last spring.

Q. Where did you do this work?

A. I was at home most of the time; done it over the telephone. The foreman would have a crew of men working and I kept track of the men that was working.

[fol. 73] Q. That was a sitting down proposition?

A. Most of the time, yes, sir.

Q. How long?

A. Well, I earned thirty-five dollars.

Q. Is that the sum total of your income since you were hurt?

A. Yes, sir.

Q. Are you able to work, Mr. Goneau?

A. No, sir.

Q. Could you climb up a box car and climb down?

A. No, sir.

Q. Could you use that left arm in that kind of work?

A. It would not support me.

Q. Could you use that leg for that kind of work?

A. No, sir.

Q. When you go up box cars you have to put one foot after the other, don't you?

A. Yes, sir.

Q. Could you do a brakeman's work at all?

A. No, sir.

Q. How about your general strength, outside of the weakness in the left arm and leg, how do you feel in your vitality?

A. Well, I don't feel very strong. I am weak. Can't get around to do anything.

Q. Give us your best recollection, honest judgment of your average monthly wages as a brakeman?

A. At least \$200.00 a month.

Q. This was 1921. Well, you started in for the Soo, then, during [fol. 74] the war?

A. 1916, the last time.

Q. You were hurt—oh, yes, 1920, a little over four years.

A. Yes, sir.

Q. How far did you go in school?

A. Partly through the fifth grade.

Q. Never went to any other school?

A. No, sir.

Q. No trade?

A. No, sir.

Q. What did you do before you railroaded?

A. Worked around saw mills and paper mills.

Q. As a laborer?

A. Yes, sir.

Q. Well, then, there is no work you know anything about except labor or railroad work?

A. That is all.

Q. To work as brakeman you have to pass an examination, don't you?

A. Yes, sir, physical examination.

Q. A brakeman's work is work where you have to move rapidly and very frequently?

A. Yes, sir.

Q. Up and down cars?

A. Yes, sir.

Q. Coupling and uncoupling?

A. Yes, sir.

Q. Over cars, running over the running board, is that right?

A. Yes, sir.

Q. Jumping from one car to another?

[fol. 75] A. Yes, sir.

Q. Did you ever do any work on the local freight?

A. Yes, sir.

Q. There you have to handle freight, don't you?

A. Yes, sir.

Q. When was your birthday?

A. June 11th.

Q. How old were you when this accident happened?

A. Thirty-two.

Q. How old were you last June?

A. Thirty-four.

Q. You say you had been railroading on the Soo for four years or more continuously?

A. Yes, sir.

Q. Railroaded for twelve years?

A. Yes, sir.

Q. Were you familiar to quite an extent with carrier irons on various freight cars?

A. I have noticed different ones, yes, sir.

Q. How about carrier irons, how frequently, if at all, had you seen freight cars with carrier irons held by one bolt, one at each end?

A. This is the first one I ever noticed with just one bolt in each end.

Q. And as you had observed and noticed carrier irons, how many bolts did they have?

A. Some had two in each end, three in each end and as high as four in each end.

Q. It there much strain put upon carrier irons in railroading?  
[fol. 76] A. Yes, sir.

Q. How much does the ordinary draw bar such as this one, weigh?

A. Between two and three hundred pounds.

Q. By that you mean the whole weight?

A. Yes, sir.

Q. Of course, the shank that runs back under the end of the car is held up by something back under the car?

A. Yes, sir.

Q. And the outer big end is held up by this carrier iron?

A. Yes, sir.

Q. Where does the strain come from in railroading on these carrier irons, what is the process?

A. Pulling cars and going over rough track, one car goes down and the other one up. There is a heavy strain on the knuckles and there is an awful strain put on the carrier iron before these knuckles will slide, let them work up and down.

Q. Bounce up and down on rough places?

A. Well, they slide up and down.

Mr. Anderson: That is all.

## Cross-examination.

By Mr. Palmer:

Q. Did you have any trouble with the train from the time you left Ladysmith until the occurrence of this accident at Gordon?

A. No, sir.

Q. You made two stops you say for coal and water?

A. Two or three stops.

[fol. 77] Q. And you made one stop to permit another train to pass?

A. Yes, sir.

Q. And you had been acting as rear brakeman throughout the journey?

A. On this trip, yes.

Q. You had no knowledge, then, that there was any bad order car in the train at all until the accident?

A. No, sir.

Q. And so far as you know, no one else had any knowledge of any bad order car in the train?

A. No, sir.

Q. There had been none of this parting of the train or anything of this character until the accident near Gordon?

A. No, sir.

Q. You had proceeded and gone along, so far as you know, just as usual?

A. Yes, sir.

Q. And you had gone about seventy miles, you think, before the accident?

A. Yes, sir.

Q. Had you been near or around the middle of the train at any time prior to the time you reached Gordon?

A. Yes, sir.

Q. For what purpose?

A. Why, when we were switching around Ladysmith and the train pulled by me I was in the middle or near the middle.

[fol. 78] Q. Well, did you observe anything wrong with any of the cars?

A. No, sir.

Q. Now, this car that was in bad order as you found it there after the train had parted, that was not a Soo line car, was it?

A. I don't remember what kind of a car it was.

Q. Well, wasn't it a Lehigh Valley car, as they call it?

A. That is what they said it was.

Q. Well, didn't you observe that night what sort of a car it was?

A. No, I did not.

Q. Which end of the car was defective?

A. It would be the east end of the west car, wouldn't it?

Q. It would be the east end of the last car of the west section, is that what you mean?

A. Yes, sir.

Q. Don't you designate cars by naming the ends, don't you call them the A end and the B end?

A. Well, when you are changing air hose or anything like that you do.

Q. Yes. The B end is the end on which the hand brake is located, isn't it?

A. Well, I don't remember the difference between the B and A end. I never had any occasion to use that definition.

Q. The air cylinder underneath the car, you are familiar with that, are you not?

A. I know that, yes.

Q. And the piston that works in it?

A. Yes, sir.

[fol. 79] Q. Isn't it true that the end towards which that piston points is called the B end always and that that is usually the end at which the hand brake is attached?

A. I couldn't say whether it would be the B end or A end.

Q. Do you recall whether this trouble was at the end that the brake was on or not?

A. I couldn't say.

Q. Do you know whether the air hose was on the right hand or on the left hand of the draw bar, as you were facing the draw bar?

A. It was on the north side.

Q. On your right hand side, then?

A. Yes, sir.

Q. As you faced the draw bar was where the air hose came out hanging down?

A. Yes, sir.

Q. Over on the other side of the draw bar was where the brake staff was, was it not?

A. Yes, sir.

Q. And you did not observe then the direction in which the piston was pointing?

A. No, sir.

Q. Your recollection is that the air hose was on the right hand side of the draw bar?

A. Yes, sir.

Q. And that the brake staff was over on the left hand side?

A. Yes, sir.

Q. As you faced the end of the car?

A. Yes, sir.

[fol. 80] Q. Was this defective car an old car or otherwise?

A. Well, I didn't pay any attention to that.

Q. Did you observe whether it had a steel end or not?

A. No, I could not.

Q. Will you say anything about the width of the car?

A. Well, it didn't appear to be so very big car, kind of a small car.

Q. Was it quite wide, seem to overhang the rails pretty well?

A. I couldn't say to that.

Q. Then your estimate here of about a foot and a half between the side of the cars and the edge of the bridge is really without any recollection of measurements?

A. Yes, sir.

Q. And without any reference to this particular car?

A. Yes, sir.

Q. Now, you have described the carrier iron here?

A. Yes, sir.

Q. You say it was about how long?

A. Something like two feet, two feet and a half.

Q. And about how wide was it?

A. Something like four inches.

Q. And about how thick?

A. Three quarters of an inch or such a matter, an inch.

Q. And you say it had one bolt at each end?

[fol. 81] A. It only had one bolt in the end where it was down.

Q. How many bolts did it have in the other end?

A. Well, I imagine it had only one bolt or it couldn't swing around. I didn't pay any particular attention.

Q. You don't know whether it had provision for more than one bolt or not, then?

A. I couldn't say for sure.

Q. Do you know how many holes were in it?

A. There was only one hole in the end where it was down.

Q. You say there was only one hole in the end where it was down?

A. Yes, sir, to my best recollection.

Q. Well, there was only one bolt, you know that?

A. Yes.

Q. But whether there was more than one hole there, you don't know?

A. No, I couldn't say to that, no, sir.

Q. Now, the other end, whether there was more than one bolt in it you don't know?

A. No, sir.

Q. Or whether there was provision for more than one bolt you don't know?

A. No, sir.

Q. The left hand end, as you faced it, of the carrier iron was held up all right, was it not, Mr. Goneau?

A. Yes, sir.

[fol. 82] Q. And was it pretty well snug up against the support there?

A. I couldn't say just how it was.

Q. Well, it seemed to hold up all right?

A. Held up some, yes. It seemed quite loose.

Q. But it was holding?

A. Yes, sir.

Q. And that was a flat piece of iron, you say?

A. This carrier iron?

Q. Yes?

A. Yes, sir.

Q. Just a single flat piece of iron?

A. Well, if I remember, it was. As near as I can remember it was, yes, sir.

Q. That is your recollection?

A. Yes, sir.

Q. Just a flat strip?

A. Yes, sir.

Q. And bolted onto what?

A. Up through some timber there or something that they call the deadwood.

Q. Was it bolted into another piece of iron, buffer-block?

A. A kind of a bumping block, yes, sir.

Q. That was iron, was it?

A. Yes, sir.

Q. Then, as I understand it, there was an iron buffer-block or bumper block, you call it, there?

A. Yes, sir.

Q. And it was to that that this carrier iron was bolted?

A. I couldn't say whether it was bolted to that iron or not.

[fol. 83] Q. What else could it be bolted to?

A. Well, it seemed as if that was what it was bolted to.

Q. Do you recollect how long the bolt was on that right hand side?

A. Probably two inches or so sticking out underneath.

Q. Yes, and how much above that?

A. Well, I couldn't say.

Q. Would it go through the iron?

A. I couldn't say that.

Q. Well, you think there were two inches down below?

A. Yes, sir.

Q. And that carrier iron was at least three-quarters of an inch thick?

A. Yes, sir.

Q. Then the other iron must have been perhaps of corresponding thickness?

A. I couldn't say it was going through another iron or whether it was going through a timber or what it was.

Q. Whether it came down through a timber or whether it just came through this iron, you don't know?

A. No, sir.

Q. But the bolt was still in there, was it not?

A. Why, the bottom end was, yes, sir, where the threads should be.

Q. Well, you say about two inches of the threads were down?

[fol. 84] A. Well, yes.

Q. Below it, two inches of the bottom of the bolt?

A. Yes, sir.

Q. How much of that had threads on it?

A. Well, a little over three-quarters of that. There was about the width of the burr where it was stripped off.

Q. Then were there no threads above that?

A. Well, no, they were battered and stripped some.

Q. But they were not entirely stripped?

A. No, sir.

Q. It was the bottom ones that were stripped?

A. Yes, sir.

Q. About an inch, you say?

A. Well, the thickness of the burr.

Q. And the burr was totally gone?

A. Yes, sir.

Q. But the bolt was there?

A. Yes, sir.

Q. This carrier iron, as you recall it, was a flat strap?

A. As near as I can remember, yes, sir.

Q. Now, you take this calendar here, which is a small, flat pamphlet and some four or five inches long and about two inches and a half wide, and put your hand or wrist on top of that; now, that illustrated the position of this carrier iron and the draw bar, does it?

A. Yes, sir, this is the draw bar and this is the carrier iron (with [fol. 85] ness indicating).

Q. And on the left hand side as you stood facing it, the carrier iron was held up fairly snug to the draw bar?

A. Well, it was held up some, yes, sir.

Q. Well, otherwise, the draw bar would drop entirely down, would it not?

A. Yes, sir.

Q. Now, when you first got there will you show us what position that carrier iron was in?

A. Well, this end was back underneath like this and hanging down like that (witness indicating).

Q. Now, you are bringing the end of the little pamphlet there around partially parallel to your arm. How near around lengthwise with the draw bar do you think it was?

A. Probably about three-quarters of the way.

Q. So that there was only about one-quarter of it that still held up the draw bar?

A. Yes, something like that, I should say.

Q. The draw bar was still resting on it?

A. Well, the edge away from me was still resting on the carrier iron, yes, sir.

Q. Under the car?

A. Yes, sir.

Q. The draw bar was still resting upon it?

A. Yes, sir.

Q. The north edge of the carrier iron?

A. Yes, it would be the north edge of the carrier iron and the south edge of the draw bar.

Q. Which way were you facing when you pulled upon it?  
[fol. 86] A. I was facing the side of the draw bar.

Q. When you first got up there you found this carrier iron twisted around under the car?

A. Yes, sir, to some extent.

Q. Around about three-quarters in line with the draw bar?

A. Something like that, yes, sir.

Q. Was the draw bar resting on this end that was swung around under?

A. Well, on the edge of it.

Q. When you first got there you found that to be the condition?

A. Yes, sir.

Q. And when you got down the second time you found that to be the condition?

A. Yes, sir.

Q. Now, you said that it was necessary to pull it around towards you so that it would be at right angles with your draw bar?

A. Be square underneath across.

Q. Straight across, crossways of the draw bar?

A. Yes, sir.

Q. How did the end of this carrier iron get over under there away from the bolt, do you know that?

A. I couldn't say.

Q. Well, was the bolt still through it?

A. No, it was down past the bolt.

Q. It was down past the end of the bolt, was it?

A. Yes, sir.

Q. Past these two inches that you speak of?

[fol. 87] A. Yes, sir.

Q. And then had swung under the bolt, is that what you mean?

A. Yes, sir.

Q. So that it could swing back under?

A. Yes, sir.

Q. Now, your object when you first got there and undertook to pull around in position, was to get hold of it, and pull it straight around crosswise with your draw bar, wasn't it?

A. Yes, sir.

Q. Now, just to illustrate; I am holding this little court calendar with my right fist resting upon it and facing towards you; will you show the jury how you stood with reference to between those cars to get hold of that carrier iron?

A. I pried up on it. I reached under here and got hold of this draw bar or carrier iron underneath or on top—I suppose underneath—and tried to pull it back crosswise underneath.

Q. Will you take hold of that little calendar and pull on it?

A. Yes, sir.

Q. Pull. Now, will you tell us how you are pulling?

A. Pulling towards me.

Q. You are pulling towards you?

A. Yes, sir.

Q. You are pulling directly back, are you not?

A. No, not exactly.

Q. Pull again now and see? Pull again.

A. I am pulling it right towards me.

[fol. 88] Q. Yes. Now, take hold of it with both hands and pull; which way are you pulling?

A. Right towards me.

Q. Directly towards you?

A. Yes, sir,—more—almost directly.

Q. Do you say that both of those times you stood right directly between those cars?

A. Well, I was between the draw bar and the side of the car, yes.

Q. Oh, you stood between the draw bar and the side of the car?

A. Yes, sir.

Q. Well, then, you did not stand facing the draw bar, did you?

A. I was facing the side of the draw bar.

Q. You were not facing, then, the front of the draw bar?

A. No.

Q. And you took hold and what did you do, did you pull or did you push?

A. I pulled.

Q. Now, I don't want to tire you, but will you take hold again of that end of the calendar and pull it around there so I can see just which way you were pulling?

A. Well, I was over here (witness indicating).

Q. Yes, I understand?

A. And I pulled out like this (indicating).

Q. You are pushing now instead of pulling, are you not?

Mr. Anderson: No, he isn't, John.

A. I took this hand and pulled here and I took this upper hand [fol. 89] and helped pull.

Q. You did not stand directly in front of the draw bar?

A. No.

Q. And then pull right straight back?

A. No, sir.

Q. You pulled off here to the side?

A. Pulled off to the side towards me.

Q. Pulled off at the side and when you pulled off at the side that brought your carrier iron around in that position, crosswise, did it?

A. Yes, sir.

Q. Were you pulling straight back on it at all parallel with the car and parallel with the train?

A. Well, I might have been pulling a little bit parallel, but pretty near straight across it.

Q. Now, the first time when you got there you say you found this carrier iron around under that draw bar?

A. Yes, sir.

Q. And it had fallen down free of the bolt?

A. Yes, sir.

Q. That is, on the right hand side, swung around under?

A. Yes, sir.

Q. You then took hold of it; you stood in front of it that time or at the side of it?

A. I stood at the side of the draw bar.

Q. Which side of the draw bar?

A. On the right hand side.

Q. All right, and then pulled towards you?

A. Yes, sir.

[fol. 90] Q. Off towards the side?

A. Yes, sir.

Q. And that straightened that carrier iron up?

A. Yes, sir.

Q. Then the second time when you got down there at the time you fell you say you found the carrier iron around in the same position?

A. Pretty near the same position, yes, sir.

Q. Was it as far around as it was the other time?

A. Well, I couldn't say; there wasn't much difference.

Q. It was about the same?

A. Pretty near the same, I imagine.

Q. And at that time it was around under the draw bar about three-quarters parallel with it, with the draw bar resting upon it and you took hold of it began to pull on it? This is the second time, now, I am speaking of?

A. Yes, sir.

Q. Yes. At that time were you standing off at the side of the draw bar?

A. Yes, sir, facing the side of the draw bar.

Q. You were facing the side of the draw bar?

A. Yes, sir.

Q. The right hand side or north side?

A. Yes, sir.

Q. And you pulled towards you?

A. Yes, sir.

Q. With both hands?

A. Well, I couldn't say I had both hands when I pulled it the [fol. 91] second time. I imagine I had both hands.

Q. You are not certain about the both hands?

A. Well, I am quite sure, but I wouldn't swear to it.

Q. Now, what happened the first time you pulled on it that second time you went there?

A. It seemed to stick, caught somewhere.

Q. Well, what did it catch on?

A. I can't imagine what it was caught on; probably the rear end was caught or maybe the side, there was a notch in it or something. It was caught, anyway.

Q. Was it caught on the draw bar?

A. I couldn't say whether it was caught on the draw bar or whether the other end of the carrier iron was caught.

Q. The other end of the carrier iron was fastened, wasn't it?

A. It might have got caught in the grooved corners or something, the heft of it might have made the corners catch some way.

Q. At any rate, the weight of the draw bar was coming down on your carrier iron all along on it?

A. Yes, sir.

Q. And you think that what held it was the weight?

A. Well, it would not necessarily be the weight. Something was holding it, anyway.

Q. What got it loose?

A. Why, I give it a harder lift with my knee.

Q. That released it?

A. Probably what released it.

[fol. 92] Q. Relieved the weight on it?

A. Yes, sir, some.

Q. And that made it come quick and easy?

A. Yes, sir.

Q. Is that so?

A. Well, yes.

Q. And that is what caused you to lose your balance?

A. Yes, sir.

Q. How high was this draw bar above the rail, we will say?

A. Why, I couldn't say just how far it was above.

Q. What is the standard height?

A. I don't know.

Q. Isn't it thirty-two inches?

A. I am not certain about that.

Q. You don't know anything about that distance at all?

A. No, sir.

Q. You did not stand on the rail, did you?

A. I don't remember whether I was on the rail or not. You mean with my left foot?

Q. Yes.

A. No.

Q. You weren't on the rail with your left foot?

A. No, sir.

Q. Your left knee was the one you put under this draw bar?

A. Yes, sir.

Q. And you had that down on the tie?

A. Well, I couldn't say whether I had it down on the tie or not, [fol. 93] but I had it under the draw bar with my left knee.

Q. You didn't have it on the rail then if you had it on the draw bar, so you must have had it on the ties?

A. Well, yes, sir.

Q. And the rails are about four inches high, are they?

A. Something like that.

Q. So it would be four inches down below the rail?

A. Yes, sir.

Q. Now, with your draw bar—how far do you think it had dropped down?

A. Enough so that the coupling would not make good.

Q. Two or three inches?

A. Yes, something like that.

Q. We will say that was about some thirty inches from the rail and your other four inches from the top of the rail down to the tie, do you mean to say that you had your toe on the tie and raised that draw bar up?

A. I couldn't say for sure.

Mr. Anderson: Just a moment. If the court please, I object to the question as wholly improper; thirty inches and four inches, the witness hasn't said anything of the sort. That is counsel who has been saying that. It isn't a proper question to put in that way.

Mr. Palmer: He spoke about the standard height, thirty-two inches.

[fol. 94] Mr. Anderson: Thirty-two inches from where to where?

Mr. Palmer: To the draw bar.

Mr. Anderson: What part of the draw bar?

Mr. Palmer: To the bottom part of the draw bar.

Mr. Anderson: Of the knuckle? It isn't in evidence. You say so, but is it?

Mr. Palmer: It is to the——

Mr. Anderson: Is it the standard height or the standard height to the center of the draw bar?

Mr. Palmer: Center of the draw bar.

Mr. Anderson: Well, that is different. The draw bar is about a foot thick.

Mr. Palmer: Oh, no.

Mr. Anderson: Well, never mind; you put the question to the witness so he can answer.

The Court: The objection is overruled.

Mr. Palmer:

Q. Did I understand you to say, Mr. Goneau, that you put your toe on the tie?

A. I had my knee under the draw bar.

Q. Yes. Where was your toe?

A. Well, I suppose I put my toe down there at first. Possibly I raised it up when I raised up on the draw bar.

Q. And you used your toe as a purchase, did you, to raise the draw bar up?

A. When I first got under there, yes, sir.

Q. The draw bar weighs about how much, you say?

[fol. 95] A. I should judge between two and three hundred pounds altogether. Maybe more.

Q. And you put your toe on the tie and raised that draw bar up with your knee?

A. No, not necessarily.

Q. What did you raise it up with?

A. Well, the carrier iron and my knee; pulling on the carrier iron helped raise it some.

Q. How?

A. Why, sliding. That is, the first time.

Q. How about the second time?

A. Well, I raised it up with my knee the second time.

Q. With your toe on the ties?

A. I couldn't say for sure whether I kept my toe on the ties.

Q. Could you take your foot off the ground and raise that draw bar up with your knee?

A. Why, it would help some.

Q. Two or three hundred pounds?

A. It would help some, yes.

Q. You said you had hold of the carrier iron with both hands, did you not?

A. Yes, sir.

Q. How else could you raise it except with your knee?

A. That and pulling on the carrier iron.

Q. How would pulling on the carrier iron help to raise the draw bar up?

A. Because it would. That edge is over there at the edge of the draw bar and when you pull on there it gradually lifts up on the draw bar because this is down here (indicating).

[fol. 96] Q. So the purchase that you gained from this draw bar resting upon the carrier iron and then your pulling on the carrier iron to get it around crosswise with the draw bar, you think would assist in raising the draw bar?

A. Yes, sir, some.

Q. So that when you got it around at right angles, then was your draw bar pretty well up?

A. Why, no. It was up more.

Q. It was still down then?

A. Yes, sir.

Q. On that side?

A. Yes, sir.

Q. The pulling upon this carrier iron pulled it straight, pulling it around crosswise, as you say, you think that would help to raise up the draw bar?

A. Yes, sir.

Q. You are sure it did?

A. Yes, sir, I imagine it helped some.

Q. Well, I thought you said the other end was rather loose, the left hand end, was that down any at all, or was it held right up there snug?

A. Well, it couldn't be up there snug.

Q. Why not?

A. Because it would not let the draw bar down as far as it did, if it had been.

Q. Well, if it wasn't up there snug and tight, how could the pulling on the carrier iron give you any purchase on it to push it up?

A. Because it was underneath and when you straightened it up it would help raise the draw bar up.

[fol. 97] Q. How loose, about, do you think this carrier iron was on the left hand end?

A. Oh, I couldn't say how loose it was. I saw it worked around pretty easy.

Q. Your best recollection is that it was the weight of the draw bar that seemed to hold this carrier iron and make it stick?

A. No, I couldn't say that. I imagine that the carrier iron, the end of it, was caught somewhere on the other side.

Q. Would that swing under, too?

A. No.

- Q. With that bolt in it would it swing under?  
 A. The other end would swing the other way.  
 Q. Well, the corner would swing under, you think?  
 A. Well, it might have caught in this instance.  
 Q. Yes, might have swung under there a little and caught?  
 A. Yes, sir.  
 Q. And your jerking may have jerked it loose?  
 A. Well, possible. It was right on the verge of coming after the first pull and I didn't know it.  
 Q. When the train first stopped you say yourself and the conductor, Mr. Bailey, were both in the caboose?  
 A. Yes, sir.  
 Q. And it was an emergency stop?  
 A. Yes, sir.  
 Q. And the conductor said that he would take care of the hind end, did you say?  
 [fol. 98] A. Yes.  
 Q. Did you see him do anything to take care of the hind end?  
 A. No, sir.  
 Q. Did you see him throw out a fuse?  
 A. I seen a fuse burning.  
 Q. When did you see that?  
 A. After the train had parted the second time.  
 Q. Where were you then?  
 A. I was up standing on the bridge or when I was coming down off the car, I think it was, the second time.  
 Q. Where did you see this fuse?  
 A. Towards the rear end.  
 Q. Was it clear at the rear end in behind the caboose?  
 A. I couldn't say just where it is located.  
 A. And the conductor then was on the ground out off of the bridge; that is, the caboose was off of the bridge?  
 A. Why, yes, it was down there that distance, that car lengths away from me, yes.  
 Q. Thirty odd car lengths?  
 A. Yes, sir.  
 Q. So it was well over onto the hard ground east of the bridge?  
 A. I expect so, yes, sir.  
 Q. Did you see the conductor at all back there?  
 A. No, sir.  
 Q. And you saw this fuse when you were on the side of the car?  
 [fol. 99] A. I could see the fuse when I was coming down; climbing down off from the car.  
 Q. When you climbed down the north side of the car?  
 A. Yes sir.  
 Q. Is the ladder on the end or on the side?  
 A. On the side near the end.  
 Q. It was then you saw the fuse burning back there?  
 A. Yes, sir.  
 Q. So far as you knew, then, the conductor was taking care of the hind end, and remained there?

A. I don't know what he done.

Q. But at any rate that is what he said, he would take care of the hind end?

A. Yes, sir.

Q. And, as a railroad man, you knew that was necessary to prevent a train from running into you from behind?

A. Yes, sir.

Q. And you were the one to go up to where the trouble was and remedy it if you could?

A. Yes, sir.

Q. So you took an S-wrench, you say, and an extra air hose and your lantern of course and started westward towards the front end?

A. Yes, sir.

Q. Now, who would have charge of the signaling of the train, the movements of the train, from then on?

A. Whoever had cause to give a signal first.

Q. Well, you would be the one to give the signals, would you not?

[fol. 100] A. Well, I had the first cause to give a signal, yes.

Q. Whatever signals you gave were the ones which would be obeyed, because you were going to fix the trouble?

A. Likely, yes, sir.

Q. There isn't any question but what you did give the signals and that they were obeyed so far as the movements of the train were made?

A. Yes, sir.

Q. You walked some distance on the ground, did you, after you left the rear of the train?

A. Until I came to the St. Croix river bridge.

Q. That was the first bridge you came to?

A. Yes, sir.

Q. And about how many car lengths do you think you had progressed from the caboose before you struck the bridge?

A. About thirty car lengths. A walked about five car lengths on the bridge after I hit the bridge.

Q. Yes, and the rest of the time you were walking on the ground by the side of the train on the north or right hand side?

A. Yes, sir.

Q. Now, when you struck the bridge, Mr. Gouneau, didn't you climb up on the cars and walk on the cars?

A. No, sir.

Q. Why did you try to walk along by the side of the train?

A. Because I expected to find the trouble most any time and I was in a hurry.

[fol. 101] Q. You walked along, did you, between the edge of the bridge and the edge of the cars without any difficulty?

A. Well, I had to hang onto the cars as I went along.

Q. You took hold underneath?

A. Yes, sir.

Q. So you worked your way along on the bridge till you got to the scene of this trouble?

A. Yes, sir.

Q. And when you got to the scene of this trouble, you found that that was only about twenty feet from the other end of the bridge, the west end of the bridge?

A. Yes, sir.

Q. That would be about a half a car length?

A. Yes, sir.

Q. So that this bad order car would be about half of it on the hard ground at the west end of the bridge and about half of it would be on the bridge?

A. Something like that, yes, sir.

Q. And the space back to the first car of the rear section was about how far, do you say, between the two cars?

A. Something like ten or twelve feet.

Q. Do you mean ten or twelve feet in addition to the natural two feet or two and a half feet that would be between the cars?

A. No, I would say between the draw bars.

Q. At any rate, there was quite a little space in there?

A. Yes, sir.

[fol. 102] Q. The air was escaping?

A. Yes, sir.

Q. From both air hoses?

A. Well, it wasn't escaping from the rear end, had all gone out; that is, all the air that wasn't in the reservoirs, in the pistons.

Q. What effect did that have on the brakes?

A. Set them in emergency.

Q. When the air leaked out of the auxiliary reservoir that would release them, wouldn't it?

A. Yes, but it would take some time for that.

Q. That hadn't happened; the brakes were all set on the rear section?

A. Yes, sir.

Q. Didn't you close the angle cock on the rear section?

A. No.

Q. You left that open and the brakes set?

A. Yes, sir.

Q. You closed the angle cock on the front section, didn't you?

A. I did after I got the draw bar fixed up.

Q. Did you let the air continue to escape on the first section?

A. Yes, sir.

Q. Didn't close the angle cock when you first got there?

A. No, sir.

Q. The west end of the east car was all right?

A. Yes, sir.

Q. That was O. K.; coupler was all right?

A. Yes, sir.

[fol. 103] Q. The carrier iron and everything was all right?

A. Yes, sir, as far as I could see.

Q. When you got to the east end of the west car, that is, the last car of the front section, there is where you found the trouble?

A. Yes, sir.

Q. Now, was the air hose broken at all?

A. No, sir, not as I could see.

Q. The air hoses were all right?

A. Yes, sir.

Q. So the only trouble was this burr being off of this bolt on the right hand side of the carrier iron?

A. That and being dropped down so it let the draw bar down.

Q. Yes, that was the only thing which was wrong, so far as you observed?

A. And the carrier iron shoved forward.

Q. Shoved toward the engine?

A. Yes, sir.

Q. That is the right hand end of it?

A. Yes, sir.

Q. Now, that is the only thing you found was wrong?

A. Well, I found the threads on this burr stripped to some extent.

Q. Was that all that was wrong?

A. And the burr was gone.

Q. You didn't notice anything else broken or out of order?

A. No, sir.

[fol. 104] Q. The first thing was your reaching under there and taking hold of this carrier iron and raising the draw up with your knee and pulling the carrier iron around crosswise?

A. At the same time, yes, sir.

Q. And in doing that you did not stand directly between the cars and directly facing the draw bar, but you stood facing the side of the draw bar?

A. Yes, sir.

Q. Did you get the carrier iron around so that it again fitted over the bolt?

A. I got it around square again.

Q. Then what did you do?

A. It was down too low to come up to the bolt.

Q. Didn't you raise it up over the bolt?

A. I did afterwards, yes, sir, when I tried this burr on.

Q. Well, then, you had to raise the draw bar, too, didn't you?

A. By lifting I had quite a lot of purchase on this carrier iron sticking out and I got it up there or tried to get it up.

Q. And put it over the bolt?

A. Tried to put it over the bolt and I saw I couldn't do it very handy and I tried my burr on then.

Q. Didn't you have the carrier iron up on the bolt when you tried your burr?

A. No, I tried to put it up there first and I couldn't get it up there and I tried the burr. I thought the burr was too big.

[fol. 105] Q. Where did you have this burr?

A. I had it in my vest pocket. I had a leather vest on.

Q. How did you happen to have the burr?

A. Just happened to pick it up.

Q. Was that a kind of a common occurrence for burrs to come off?

A. No, sir, I just happened to pick it up.

Q. Do you know how long you had carried it?

A. Well, I think I picked it up that day.

Q. You don't know where?

A. No, I wouldn't say. I suppose Ladysmith, if I did.

Q. And you tried it on this bolt and it would not fit?

A. It was too large, yes, sir.

Q. What size was the bolt?

A. Well, the burr was a seven-eighths inch burr and according to the fit I would call the bolt a three-quarter inch bolt.

Q. And you did not find that it was of any use to try to put that carrier iron up over the bolt?

A. I couldn't do it.

Q. As soon as you got that around and got the carrier iron up crosswise, that had raised the draw bar quite a little, hadn't it?

A. Well, it raised it a little bit, yes.

Q. Then what did you do with the good draw bar over on the other car?

A. Opened the knuckle on that one, pulled it towards me.

Q. Now, you had this draw bar on your front section with the [fol. 106] carrier iron crosswise?

A. Yes, sir.

Q. You had your knuckle open on your other car and pulled over towards you?

A. Yes, sir.

Q. Because the one on the bad order car had sort of sagged down, which brought it over towards north, is that it?

A. Yes, sir.

Q. So your idea was to pull the good one over toward the north also?

A. Yes, sir, and push the other one south.

Q. Did you push the other one south?

A. I pushed it south as I done that, before I went over and opened the knuckle after I put the shims in.

Q. Before you got these shims to which you have testified, did you not try the coupling to see if it would make?

A. No, sir.

Q. How did you know that it would not make?

A. Well, I could see it was down too low.

Q. Didn't you try it at all?

A. No, sir. I figured it was too low so it would not make and I had to get the draw bar up higher.

Q. You did not have the cars come back together to see whether it would make or not?

A. No, sir, not that time.

Q. When did you close this angle cock, before or after you went after the shims?

A. After. After I had everything all ready.

Q. What caused you to go after those shims at the west end of [fol. 107] the bridge?

A. Well, I was looking for something that I could put under there between the draw bar and the carrier iron.

Q. Did you have any trouble finding these shims?

A. No, sir, I happened to stumble across them just a little ways from the bridge, on the ground at the end of the bridge.

Q. And they are sort of wedges that you use to drive under the rail, usually?

A. No, these were square, I imagine. They are blocks.

Q. They use them to put between the rail and the tie?

A. Yes, sir.

Q. Were these old or new ones that you found?

A. Well, they looked quite old.

Q. How many of them did you get?

A. Two.

Q. How did you get them between the draw bar and the carrier iron?

A. I put them in both at the same time at the edge and raised up on the draw bar with my body and shoved them underneath at the same time.

Q. You did not raise the draw bar that time with your knee?

A. No, sir.

Q. You just took your whole body?

A. Yes, sir.

Q. Then you could raise it?

A. It would help raise it and by crowding these shims it went [fol. 108] up.

Q. Then you laid the shims right under between the carrier iron and the draw bar?

A. No, sir, part way under.

Q. That raised the draw bar up enough so you thought it would couple all right?

A. Yes, sir, make a better coupling than without them.

Q. But you hadn't tried to see whether you could make a coupling without them?

A. No, sir.

Q. After you got them under there did it bring the carrier iron up tight and solid against your draw bar?

A. It didn't bring it up to amount to anything, but it helped hold it there.

Q. And the other end seemed to be holding all right?

A. Yes, sir.

Q. Then what did you do?

A. I pushed the draw bar away from me in order to line it; then went back and opened the knuckle on the good car, pulled it towards me. Then I closed the angle cock.

Q. On the front section?

A. Yes, sir. Picked up my air hose and wrench and lantern and climbed up on the west car on the east end.

Q. Prior to the time you climbed up on the west car of the east section, did you see the head brakeman Rocheleau up towards the engine?

A. No, sir.

[fol. 109] Q. Hadn't you seen him all the time you were so working around there?

- A. No, sir.
- Q. Didn't you see anything of him while you were over getting the shims?
- A. No, sir.
- Q. You had walked towards the front end?
- A. Only a little ways.
- Q. You were facing in that direction?
- A. Yes, sir.
- Q. Where was Rocheleau?
- A. When I got up on top of the cars he was up on top.
- Q. Whereabouts?
- A. Up towards the engine.
- Q. How far from you, do you think?
- A. Well, he could be twenty-five car lengths away from me.
- Q. You think he was twenty-five car lengths away from you?
- A. All of that, yes, sir.
- Q. And up on top of the cars?
- A. Yes, sir.
- Q. How do you know he was?
- A. Because I was on top and I could tell he was on top.
- Q. Could you see his lantern?
- A. I saw the lantern.
- Q. Could you see him himself?
- A. No, sir.
- Q. It was not until you got up on top of the car that you saw Rocheleau?
- [fol. 110] A. No, sir, I didn't see him until I got on top of this car.
- Q. Could you see the engine?
- A. No, sir.
- Q. Couldn't give any signals to the engineer, then?
- A. No, sir.
- Q. That would be the engineer's side that you were on, wouldn't it?
- A. Yes, sir.
- Q. You got up on top, you think, of this car?
- A. I did get up.
- Q. You are sure about that?
- A. Yes, sir.
- Q. Then you did what?
- A. I laid my air hose and wrench on the running board and then gave a back-up signal.
- Q. Who did you give that to?
- A. To Rocheleau on top of the cars with this other lantern.
- Q. Did he seem to get it?
- A. Yes, sir.
- Q. And what did he do?
- A. He repeated it to the engineer.
- Q. Did you give a signal that would indicate how far he was to back up?
- A. No, there was no occasion for that here.

Q. But at this time there was some ten or twelve feet between the draw bars, or rather the sections?

A. Yes, sir.

Q. The engineer came back pretty fast, you say?

[fol. 111] A. No, it was some few minutes or seconds before he started to move at all.

Q. He had to pump up the air to release his brakes on this front section?

A. Yes, sir.

Q. And then did he come back pretty fast?

A. No, not very fast. Of course, there was a little jar, but not much of a jar.

Q. The front section was loose and the hind section locked?

A. Yes, sir.

Q. Did it make a pretty hard bump when they came together?

A. Not so very hard, no, sir.

Q. Didn't throw you off?

A. No, sir.

Q. Nor didn't throw Rocheleau off?

A. No, sir.

Q. Could you still see Rocheleau up there?

A. Yes, sir.

Q. Then what happened?

A. I gave a stop signal.

Q. What for?

A. After the cars came together. Well, just natural to give a stop signal. He couldn't go any further, but I naturally gave a stop signal.

Q. Your coupling had made all right?

A. After I came down and looked at it it had, yes.

Q. And you did not have any trouble connecting up your air hose?

A. Well, the coupling didn't make all right. It made a half a [fol. 112] coupling.

Q. Well, it was together so——

A. So it would hold.

Q. Otherwise you could not have connected your air hose?

A. No.

Q. You did connect your air hose all right?

A. Yes, sir.

Q. Then what did you do?

A. Opened the angle cock on the east end of the west car, that was so the engineer could pump up the air and release the brakes on the hind section.

Q. Then what happened?

A. I climbed back up on top of this same car, the east end of the west car.

Q. Why did you climb up on the car?

A. Because they could not see signals from where I was out on the bridge.

Q. Rocheleau could, couldn't he?

A. No, he could not.

- Q. He could not if he had been on the ground?
- A. No, sir.
- Q. Why?
- A. Because he was on the other side of that Omaha bridge from me.
- Q. Exactly. Did the bridge obstruct the giving of signals?
- A. Yes, sir.
- Q. How so?
- A. Well, you can't very well see through steel.
- Q. Well, how much steel?
- A. It was eight foot high.
- [fol. 113] Q. Eight foot high?
- A. Something like that, yes, sir.
- Q. Girders on that Omaha bridge?
- A. Yes, sir.
- Q. Did you ever measure them?
- A. Well, I have not measured them, but I had occasion to notice quite a bit how high they were.
- Q. You do not know as to their height, then?
- A. They are higher than a man could be to give signals and see them.
- Q. They were right along parallel with the side of the train, were they not?
- A. Lengthwise, yes, sir.
- Q. You think Rocheleau was that far down the other side of the Omaha bridge?
- A. Oh, yes, from me.
- Q. You are sure he was on top of the cars, are you?
- A. When I climbed back up again he was still on top of the cars.
- Q. What signal did you give then?
- A. Gave another back-up signal.
- Q. What for?
- A. With the intention of backing into Gordon to get into the clear for 18, passenger train.
- Q. You did that of your own motion?
- A. Well, I knew we didn't have time by looking at my watch to go to Solon Springs and we had to get in the clear.
- Q. Did they start to back up again all right?
- A. Well, they started backing up. Took quite a little while to pump the rear end of it, release the brakes, started backing up by [fol. 114] jerks. The engine was slipping, but she still backed up.
- Q. Make considerable jolting and jerking?
- A. Yes, sir.
- Q. Didn't throw you off the car?
- A. No, sir.
- Q. Didn't throw Rocheleau off the car?
- A. No, sir.
- Q. Were they backing up hill a little?
- A. Why, the head end was backing up hill. The rear end was about on the level.
- Q. And they kept on backing about how far?

A. About twenty feet.

Q. About half a car length?

A. Something like that.

Q. That was all they backed?

A. Yes, sir.

Q. Then what happened?

A. Broke in two again. That is, our hose, air hose, snapped and the train stopped again.

Q. The front section was backed right against the hind section, was backing right up?

A. Yes, sir.

Q. Against the hind section and still there was a parting there?

A. Yes, sir.

Q. The air hose broke in two?

A. Yes, sir, on account of the jerking it caused the knuckles to disconnect and broke the air hose again.

Q. Did it make considerable of a jolt when they stopped?

[fol. 115] A. Why, not much of a jolt. I braced myself for a jolt, but there wasn't any.

Q. They stopped in emergency that time, too, didn't they?

A. Yes, sir.

Q. Because the air hose was parted?

A. Yes, sir.

Q. The brakes were set in emergency that second time and you were going real slow?

A. Yes, sir, set the brakes as hard as they can.

Q. What did you do then?

A. I came back down between the cars again.

Q. You did not find anything wrong with the first car on the rear section?

A. No, sir.

Q. What did you do with reference to the angle cocks?

A. Left them alone.

Q. You let them both blow?

A. Yes, sir.

Q. Then what did you do?

A. Well, I attempted to fix up this draw bar again or went about it to fix it up again so I could make the coupling.

Q. About how far from the west end of the bridge were you then?

A. Well, probably about forty or fifty feet, somewhere along there, forty feet.

Q. If you had given the engineer a go-ahead signal, he could have gone ahead off the bridge, couldn't he?

A. I couldn't give a go-ahead signal from the ground.

[fol. 116] Q. You could give it from the top of the cars?

A. I would have to shut the angle cock off for him to pump up the cars; take quite a little time.

Q. Was Rocheleau on top of his car then?

A. That was the last I seen of Rocheleau when he answered that back-up signal.

- Q. You don't know about any others?  
 A. No, sir.
- Q. And you found that this carrier iron was loose again?  
 A. Yes, sir.
- Q. Just like it was before?  
 A. Yes, sir.
- Q. Well, you hadn't put any nut on there?  
 A. No, sir.
- Q. Was it up over the bolt when you had put the shims in?  
 A. No, sir, just the opposite. The shims would press down on it.
- Q. The shims would press down on it?  
 A. Instead of raise it up.
- Q. But they would raise the draw bar up?  
 A. Yes, sir.
- Q. Where were the shims when you got down there the second time?  
 A. They were gone. I saw they were not anywhere around in sight.
- Q. They were not there at all under the draw bar?  
 A. No, sir.
- Q. Nor they were not there on the bridge?  
 [fol. 117] A. No, sir.
- Q. And what do you say about this carrier iron?  
 A. It swung back underneath again.
- Q. Just like it was the first time?  
 A. Yes, sir.
- Q. That is, about three-quarters parallel with the draw bar and the draw bar resting on it?  
 A. About that far, yes, sir.
- Q. And then it was that you took hold of it again?  
 A. Yes, sir.
- Q. Standing at the side of the draw bar?  
 A. Facing the side of the draw bar.
- Q. And there was about what space between the cars then?  
 A. Something like about four feet.
- Q. About four feet between the draw bars, you mean?  
 A. Yes, sir.
- Q. That would be in addition to the two feet and a half naturally there which would make it about six feet and a half between the cars?  
 A. Six feet, six feet and a half, something like that.
- Q. And that was the time you put your knee under the draw bar again?  
 A. Yes, sir.
- Q. Raised up, did you, so (counsel indicating)?  
 A. Well, yes, raised up with my knee. Helped take off the weight off the draw bar.
- Q. And caught hold with both hands?  
 [fol. 118] A. I did. I had hold with both hands the second time I pulled.
- Q. Oh, you didn't have both hands the first time?

A. I wouldn't say for sure.

Q. Yes, you used only one hand?

A. Sure, I did.

Q. And that is the time it stuck?

A. Yes, sir.

Q. And then you took both hands?

A. Yes, sir.

Q. And raised up harder with your knee?

A. Yes, sir.

Q. And you jerked still harder on your carrier iron?

A. Yes, sir.

Q. With both hands?

A. Kind of raised up at the same time.

Q. And then it slipped?

A. It let go.

Q. Came around quickly?

A. Yes, sir.

Q. Came easy?

A. Yes, sir.

Q. And you stepped down?

A. Caused me to step down.

Q. With your right foot?

A. Yes, sir.

Q. And you stepped down in between the timbers, between the ties?

A. I think I slipped down between the ties, yes, sir.

[fol. 119] Q. Then brought your left foot down?

A. Well, I lost my balance when I stepped with my right foot.

Q. As far as you knew the carrier iron was still attached over on the left side when it swung around?

A. As far as I know.

Q. And you just simply swung around,—came around crosswise?

A. Well, either done that or let go altogether. I couldn't say.

Q. When you left it was it around crosswise?

A. When I lost my balance I let go of everything.

Q. Whether it was around then you don't know?

A. No, sir.

Q. In standing at the side of the draw bar, as you say, facing the side of the draw bar, that air hose hanging down there would be directly in front of you, wouldn't it?

A. No, it would be to my right. Some in front of me and to my right. Probably be to my side here.

Q. Right between you and the carrier iron, wouldn't it?

A. No.

Q. I will call this Defendant's Exhibit 1. And calling your attention to it, I will ask you if that is a fair and substantial representation of the bridge and a box car standing on the bridge and a man standing at the rear of it?

[fol. 120] A. Yes, sir.

Q. Now that man is standing on which side of the draw bar?

A. He is standing on the left side, just the opposite side I was on.

Mr. Palmer: We offer in evidence Defendant's Exhibit 1 for the purpose of illustration only.

(Defendant's Exhibit 1 received.)

Q. You think that you stood over at the right hand side of this draw bar where that air hose is?

A. Yes, sir.

Q. And you reached around under that car and did this jerking that you speak of when you lost your balance?

A. Well, I was standing kind of under the car, under the end of the car, facing the draw bar.

Q. You were not standing, then, right directly between the cars and facing this draw bar squarely?

A. No, sir, facing the side of it.

Q. Then you were not standing squarely between the rails of the track on the bridge?

A. No, I was standing to the side.

Q. Which side of this north rail were you standing?

A. I couldn't say I was standing on either side. I must have been inside or I might have had my right foot outside. I couldn't say.

Q. You were in this gap of some six feet and a half between the cars and over on the right hand side of the draw bar?

A. Yes, sir.

Q. Of the last car of the front section?

[fol. 121] A. Yes, sir.

Q. That is, the east end of that car?

A. Yes, sir.

Q. And there was back of you then to the next car a space of about six feet and a half?

A. Well, I should judge about four feet to the draw bar.

Q. From the end of your draw bar that you stood at?

A. Between the two draw bars.

Q. But you were not standing at the end of this draw bar on the bad order car; you were standing up alongside it?

A. Yes, sir.

Q. So you were standing, as you say, pretty well along the edge of the bad order car?

A. Yes, sir.

Q. And when you fell you did not fall in the direction of the car behind you at all?

A. Well, I imagine I went almost straight backwards.

Q. That is straight out?

A. Right straight north.

Q. Were you facing south?

A. Yes, sir, just about south, yes, sir.

Q. Facing just about south?

A. Yes, sir, just the opposite direction I fell, yes, sir.

Q. When you fell off the bridge, then, you left a space between those cars of about six feet and a half?

A. Four feet between the two draw bars.

[fol. 122] Q. Four feet between the draw bars; and between the ends of the running board on top would leave a space of about six and a half?

A. Well, I couldn't say about that, how far they would be apart, but I imagine the draw bars were about four feet apart.

Q. Well, you say the natural distance is about two feet and a half between the ends of your running boards on the top?

A. Two feet or two and a half.

Q. Then there was four feet in addition to that?

A. Yes, sir.

Q. And that space was some forty or fifty feet from the west end of the bridge?

A. Yes, sir.

Q. After you fell off of the bridge did you see the cars up there move at all?

A. I don't remember seeing them move, no, sir.

Q. Between the time you fell and the time someone came down there to you, you don't remember seeing any movement at all?

A. No, I cannot recollect.

Q. In fact, Mr. Goneau, from the time that the two cars parted that second time to the time you fell off of the bridge there was no movement of either section of that train, was there?

A. I couldn't say that there was or was not.

Q. Well, did you feel any movement?

A. No, I did not.

Q. The rear section could not move, could it?

A. It couldn't move, no, sir.

[fol. 123] Q. It could not move; the brakes were locked on it, so there was no movement of either section?

A. No, sir.

Q. And when you fell there was still that space?

A. Yes, sir.

Q. So far as you know between the two cars and how the train was ever brought together again you don't know anything about that?

A. I don't know anything about that, no, sir.

Q. And after you fell and lighted on the ground underneath as you say, the first thing you recall with reference to anybody else was a light up on the bridge above you?

A. Yes, sir.

Q. Do you know whose light that was?

A. No, sir.

Q. What became of your own lantern?

A. My own lantern fell down too.

Q. It went down with you?

A. That is what I heard afterwards; found it afterwards.

Q. Well, you had it in your hand when you fell, didn't you?

A. I suppose I did.

Q. Did you see your lantern after you had fallen?

A. No, sir.

Q. And this light that you saw on the bridge was it right straight above you?

A. Yes, it seemed to be. I couldn't say for sure. I was in such pain that I don't remember much about it.

[fol. 124] Q. Yes, of course, but you don't know whose lantern that was?

A. No, sir.

Q. Who was the first person who got down there to you, as you can recollect?

A. Well, Rocheleau was the first man I remember of talking to. I asked him for his mackinaw, but that is the first words I remember or the only words I remember saying.

Q. He came down off the bridge, didn't he?

A. I suppose he did. I don't know.

Q. And you saw him?

A. I don't remember seeing him.

Q. How could you speak to him without seeing him?

A. Well, I see him, yes, afterwards.

Q. Now, when saw him you began to talk?

A. I asked him for his mackinaw.

Q. Why did you ask him for his mackinaw?

A. Because I was cold.

Q. Well, wasn't the first thing he said to you, "How did this happen, Ernie?"

A. I don't remember of him asking me anything like that.

Q. Well, you knew him well?

A. Not very well, no, sir.

Q. You knew his name?

A. It is pretty hard for me to speak it. I remember it.

Q. Well, you knew he was the head brakeman on that train that night?

[fol. 125] A. Yes, I knew he was working on the head end.

Q. And the first question he asked you when he got down, he said, "How did this happen, Ernie," didn't he?

A. I don't remember of him saying that, Mr. Palmer.

Q. And didn't you say to him there at that time, "I stepped off?"

A. I don't remember saying that, no sir.

Q. You don't remember?

A. No, sir.

Q. Whether you said that to him or not?

A. No, sir.

Q. You don't say that you didn't say it or that you did say it?

A. No, sir.

Q. Who was the next person who came down there under the bridge?

A. I don't remember of any person.

Q. You asked Frank for his mackinaw, and you saw he tossed it to you or threw it to you or something?

A. Yes, sir, it seems to me I remember he threw it to me.

Q. Why did you want his mackinaw?

A. I was cold.

Q. Did he help you put it on?

A. I don't remember of him helping me put it on.

Q. Did somebody help you put it on?

A. I don't remember of anybody putting it on me, no, sir.

[fol. 126] Q. Do you remember getting up and walking away over to the other side of the bridge?

A. No, sir.

Q. And sitting down on a log?

A. No, sir.

Q. Did you get that mackinaw onto yourself somehow?

A. I don't remember whether I did or not.

Q. Do you remember whether you got any warmer or not?

A. No, sir.

Q. Well, did you see the other boys there right away, wasn't Sam Bailey there, the conductor?

A. I don't remember seeing him.

Q. Wasn't George Barnaby there with his torch?

A. I don't remember seeing him.

Q. Well, who carried you up?

A. I remember being carried up on the stretcher or something by the steep bank. I didn't know anybody.

Q. Do you remember George Barnaby, the engineer, coming down there and the first thing that he said to you, "How did it happen, Ernie?"

A. No, I do not.

Q. And didn't you say to him, "I slipped and fell?"

A. I don't remember saying anything like that.

Q. You don't remember whether you did or not?

A. No, sir.

Q. Then you have no distinct recollection of any of the boys being there except Rocheleau?

[fol. 127] A. That is the only thing I remember of, yes, sir.

Q. And when they took you up on the stretcher the passenger train had come up, had it?

A. Yes, sir.

Q. No, 18?

A. Yes, sir.

Q. Going the other way?

A. Yes, sir.

Q. And they put you in the baggage car of that passenger train?

A. Yes, sir.

Q. How your train got off the bridge, you don't know?

A. No, sir.

Q. Isn't it your best recollection now when you go back and think about it that when you first got there to the scene of that trouble that night that you shut the angle cock on the front section?

A. No, I didn't shut it.

Q. Well, let me finish, please. You shut your angle cock on your front section and signalled to your engineer to back up to see if that coupling would not make?

A. No, I didn't do that.

Q. Of itself and didn't it make all right?

A. No, sir.

Q. And then, didn't you signal the engineer to go ahead slightly?

A. No, sir, I didn't give no go-ahead signals no time.

[fol. 128] Q. Didn't you put the shims in after that, after the engineer slacked ahead and the train parted, wasn't it then you got the shims and put them in there and tried it again and that your coupling made the second time?

A. No, sir.

Q. And that you stepped out of there to give the signal to back up?

A. No, sir.

Q. Or go ahead and stepped too far and you simply stepped off that bridge?

A. No, sir.

Q. And didn't you leave that train all coupled up?

A. No, sir.

Q. And the air hose connected?

A. No, sir.

Q. Was not the last thing you did to go in there and couple up this air hose and then step out?

A. No, sir.

Q. And step too far?

A. No, sir.

Q. And step off the edge of the bridge?

A. No, sir.

Q. You do not think that is the way it happened at all?

A. I know it didn't happen that way.

Q. About your injuries; you spoke about not having done any work since you were injured?

A. No, sir.

Q. Have you tried to do any work?

A. I have tried to do things, yes, sir. I have done some things.  
[fol. 129] Q. You spoke about having to undergo a physical examination in order to take up work for the railroad company again?

A. Yes, I would have to take a physical examination, yes, sir.

Q. Have you applied for reinstatement with the company at all?

A. No, sir.

Q. Well, now, if you go back in the service of the company, you know you would not have to undergo any physical examination?

A. They wouldn't take me back in my condition.

Q. Have you tried?

A. No use trying.

Q. Have you asked them to take you back?

A. No, I have not.

Q. Nor have you asked them to put you back at such work as you may be able to do?

A. No, sir.

Q. You have some four years' rights with the company?

A. I did have, yes, sir.

Q. You have not been discharged, to your knowledge, have you?

A. No.

Q. Nor your records closed, to your knowledge?

A. No.

Q. And the other time when you met with an accident, as you say, and were laid up for a month or so, you did not have to undergo a physical examination before you went back to work, did you?

A. Not for a small injury like that, no.

[fol. 130] Dr. HERMAN A. DRECHSLER, on behalf of plaintiff, duly sworn, testified as follows:

Direct examination by Mr. Anderson:

Q. You reside in the city of St. Paul, Doctor?

A. Yes, sir.

Q. You are a practicing physician and surgeon?

A. Yes, sir.

Q. And you are licensed to practice your profession under the laws of this State?

A. Yes, sir.

Q. Of what medical college or institution are you a graduate?

A. University of Minnesota.

Q. And when did you graduate from that university?

A. 1902.

Q. That is as a physician and surgeon?

A. Yes, sir.

Q. Then did you have to pass any examination in order to be licensed to practice or not?

A. Yes, sir. I took what they call the state board examination.

Q. Are you engaged in practice as a physician as well as a surgeon?

A. Not at the present time.

Q. For some years you have been largely engaged in surgery?

A. Yes, sir.

Q. Have you taken any other course of study other than the university course?

[fol. 131] A. I have taken post-graduate courses abroad.

Q. How long were you abroad?

A. Three years.

Q. In pursuing your studies as a physician and surgeon?

A. Making a specialty of surgery.

Q. In hospitals and places provided for that purpose?

A. Yes, sir.

Q. And were you in hospitals at all after you graduated here, as an interne or anything of that sort before you started to practice?

A. Well, I served my internship immediately after my graduation.

Q. How long after your graduation was it that you went to Europe?

A. 1904.

Q. Gone three years, you say?

A. Yes, I returned in 1907.

Q. Studied, among other places, in Berlin?

A. Berlin and Vienna.

Q. Doctor, you were present and testified as a physician in this case a year ago last September, I believe?

A. Yes, sir.

Q. You made examination of the plaintiff before that trial, I believe, as you remember?

A. I did.

Q. Do you remember how many times you examined the plaintiff before you testified in September, 1921?

A. I examined him twice.

[fol. 132] Q. Do you remember the date of the first examination?

A. January 7th, 1921, was the first examination.

Q. And the second examination was made when?

A. September 8th, 1921.

Q. That, of course, was made just before we were getting ready to try the case?

A. Just before the trial.

Q. Those examinations were made at my request as attorney for the plaintiff?

A. Yes, sir.

Q. You were not his attending physician at all?

A. No, sir.

Q. Never knew him, I suppose, until he came to your office for the examinations?

A. I did not.

Q. Have you made a still subsequent examination?

A. I examined him for this trial. That was the 2nd of February, 1923.

Q. That was in St. Paul; he came down there?

A. Yes, sir.

Q. And have you examined him since?

A. I examined him today.

Q. In connection with Dr. Webster and Dr. Jamison, I presume, today?

A. Yes, sir.

Q. Now, take that first examination, Doctor, tell this jury and the court what you did in the examination?

A. Mr. Goneau came to my office in the afternoon of January 7th, 1921. His personal history was taken and the history of an [fol. 133] accident that had happened to him in October, 1920. He went through what we call a general examination. His urine was tested, his nervous system was tested and the organs of special sense were gone into. He was found normal in these respects except for the evidence of an injury to his left chest, his left arm, his left sacroiliac joint and his left leg.

Q. Stripped him, did you?

A. Yes, sir.

Q. And in connection with and as a part of this January examination did you assist in the taking of some X-ray pictures?

A. I did.

Q. I show you Exhibit B, a large glass plate, will you examine

that, Doctor, and tell us if that is one of the X-ray pictures taken at the time referred to?

A. Yes, sir, it was taken the 2nd of January, 1921.

Q. That was in Dr. Fullerton's office?

A. Yes, sir.

Q. And did you attend the taking of that picture?

A. I did.

Q. Assist in the development?

A. I did.

Q. Do you know it is a true and correct X-ray picture of the parts exhibited thereon?

A. I do.

Q. What part of the body?

A. What is known as an X-ray of the chest.

[fol. 134] Q. Does that show the ribs on the left side?

A. Yes, sir. Both sides.

Q. And does that assist you in arriving at any conclusion as to what is the matter with the plaintiff, as far as the bones are concerned?

A. Yes, sir, and the condition of the left lung.

Q. Does this X-ray show anything about the position of the heart?

A. It does not.

Q. What did you find wrong with the plaintiff's left chest and the parts in January, 1921?

— The ribs of the left side, the 5th, 6th, 7th, 8th, 9th and 10th had been crushed at a point about two inches from the spinal column. The ends of the ribs were driven in and they had healed in that situation. A bone when it heals the way nature intended is in what we call apposition, end to end. But these ribs had healed in this situation (indicating).

Q. Could that be designated with the broken ends or crushed ends overlapping?

A. Yes, that would be one crushed end and this would be the other (indicating), with the exception of the tenth rib. The tenth rib had not suffered as severe an injury and had healed practically end to end, but the fifth to the 9th inclusive were overlapping. This was especially noticeable in the 5th and the 6th ribs; that is, the over-lapping was more pronounced in them than in the others. The overlapping in the 5th was about two inches and the 6th I would say about an inch and a half.

Q. But the crushed bones had, so far as you could tell, grown [fol. 135] together?

A. Yes, they were lying in apposition side by side, and from palpitation you would say they were lying in that position in a rather firm union.

Q. Any difference between this breaking of these bones and what we speak of when a bone is fractured?

A. When a bone is subjected to great violence, as this had evidently been, we find these ends of the bone instead of being broken in a clean manner, are broken jagged and the ends look rough and

then particles of bone sticking around them and the ends are more crushed in than when we have a clean break of a bone.

Q. And what, if anything, did you find wrong with the left shoulder?

A. The left shoulder had evidently sustained some injury to the region of the internal cord of the brachial plexus.

Q. Does that affect the arm?

A. Yes, sir.

Q. Going back to the chest, before we leave that, what have you to say with reference to what you found as to the plaintiff's heart?

A. The heart at that time was displaced an inch towards the sternum; that is, the breast bone; middle of the bone.

Q. Does that mean the entire heart or some particular portion of it or what?

A. The right heart was evidently dilated because the apex beat at that time was in its normal situation.

[fol. 136] Q. The apex is which part of the heart?

A. That is the left heart, the heavy heart; that is the heavy muscle that pumps the blood to all parts of the body.

Q. What do you mean by right heart and left heart?

A. The heart is divided into four chambers, two of which serve the lesser circulation through the lungs what we call the right heart and two of them which serve the greater circulation which goes through the entire body, except for the lung circulation.

Q. What was displaced one inch to the left?

A. The right border of the heart was an inch nearer or enlarged, out of place; this would give the heart a displacement of an inch.

Q. And what did you find with reference to the lung conditions?

A. The right lung was practically normal. There was a little more air in the right lung than you would get in a normal lung; that is, the lung was more expanded evidently, because it contained more cells than a normal right lung would. When we came to examine the left lung we found the entire posterior third of the lung tissue destroyed.

Q. Is that the lung that is in the cavity in there up against the ribs that have been crushed?

A. Yes, sir.

Q. What condition was that in?

A. The lung tissue in itself is made up of what we call air cells, so that the air can get into the lung to be aerated in the action of [fol. 137] respiration, but the posterior third of this lung has been destroyed in the sense that there was absolutely no air in it. The air cells were gone and were replaced by a fibrous tissue. It was a patching that nature sets in there to bind what is left of the lung in its normal form.

Q. Is that fibrous tissue as you find it here of any use to the plaintiff in breathing or any lung use?

A. It has absolutely no lung action.

Q. With reference to the heart and the heart's action as you found it in January, how is it impeded?

A. The heart pumps its blood in order to free it from the impuri-

ties of the body, purify it with the oxygen, from its right ventricle of the heart into the lungs. If there is a portion of the lung through which the blood does not course freely, does not take air as it should, in fact which is replaced by fibrous tissue to such an extent, it acts as a block in the circulation. In other words, the heart must use more force and pump harder in order to get the blood through that lung than it did before such a lung is injured.

Q. And which part of the heart is doing this pumping?

A. That is the right heart.

Q. And is that the condition you found in this plaintiff?

A. Yes, sir.

Q. Is that a serious disabling condition or not?

[fol. 138] A. That is a very serious and a very disabling condition.

Q. Still confining ourselves to the January, 1921 examination more than two years ago, tell us about the left arm and the parts in detail?

A. There was an injury to the inner cord of the brachial plexus, which is a bundle of nerves which comes out from underneath the shoulder and the long cord that extends downward through the arm to the little finger. We found an evidence of injury to this inner cord that showed itself in the ulnar nerve, in that there was a numbness and lack of sensation and a lack of motion in the muscles and the skin supplied by the ulnar nerve. This showed up very distinctly at that time in the hands. There was a wasting away of the interossei muscles and the lumbricales which are the little muscles that lie between the fingers and there was a lack of sensation elicited by various tests of the skin on the outer part of the little finger, the entire little finger, and outer part of the third finger, the ring finger. The muscles supplied by the motor part of this nerve we found were also flabby and while there had been some atrophy it was not very pronounced at that time and it looked as if there might be some improvement in the arm.

Q. What part of the arm does that cover?

A. All of it.

Q. Is there some nerve up here (indicating)?

A. The musculospiral nerve. That was not injured in this case. That supplies the other part of the arm.

Q. At the time of the examination in January, 1920, did you [fol. 139] make any tests or take into consideration the strength in the arm as to whether it was normal or otherwise, or the hand?

A. Yes, we used what we call hand grip.

Q. How did you find it, if you remember?

A. It was less than it was. Less in the left arm than normal.

Q. Does that cover the arm at that time, in January?

A. Yes, sir.

Q. How about the sacroiliac joint and left leg?

A. There was an injury to the left sacroiliac synchondrosis where the bone, the sacrum, the center bone, and the ilium, the outer bone, comes together and is bound together by ligaments, the entire course of the sciatic nerve was very tender to the touch away down to the

tendon achilles at the end of the heel. The left leg measured an inch less below the knee than the right leg.

Q. The lower end of the back bone comes down in sort of a wedge shape?

A. Yes, sir.

Q. And these two bones on the side here come up against it and joints together back here (indicating)?

A. Yes, sir.

Q. Are they joints in the proper sense of the term?

A. No, the bones just lie together with a pad of fibro-cartilage between them, bound together with ligaments.

[fol. 140] Q. There are two ilia, of course, one on either side?

A. Yes, sir.

Q. The right one was not injured, as I understand it?

A. No, sir.

Q. To what extent was the left one injured?

A. The X-ray plates show what we call a dropping, a subluxation, of the hip bone or ilium in its relation to the sacrum or end bone of the spine of about half an inch.

Q. And the ligaments that were spoken of; they are the binding matter that holds that bone in juxtaposition?

A. Yes, sir.

Q. When it is torn, is that an injury that is serious or trifling?

A. When those ligaments are torn and this bone becomes loose to this extent, it remains so, permanent and there is no way of fixing it.

Q. Did you mention that about the left arm, as to whether it was less in size in January, 1921?

A. There was an inch difference in the upper arm and three quarters of an inch in the lower arm, the forearm; that is, the left arm was an inch, the upper arm, less than the right arm was circumference, and three quarters of an inch in the forearm less than in the right forearm.

Q. You spoke of an X-ray picture of the lower part of the body; we had one here at the other trial, didn't we?

A. Yes.

[fol. 141] Q. Showing you Plaintiff's Exhibit C, is that the one you have just referred to?

A. Yes, that is the plate taken January 7th, 1921.

Q. Correct, is it?

A. Yes, sir.

Mr. Anderson: I will offer in evidence Plaintiff's Exhibit- B and C.  
Mr. Palmer: I think there is no objection to them.

(Plaintiff's Exhibits B and C received.)

Q. The picture of the sacrum and the pelvic region. I think is Exhibit C?

A. Yes, sir.

Q. What are these two twin, round shadows in Exhibit C?

A. That is what is called the right and left ilium.

Q. And calling your attention to the shadow, straight line above, passing down towards those two with darker spots between, what is that?

A. That is the spinal column, back bone.

Q. Is the sacrum that part extending down in between the two ilia?

A. Yes, sir.

Q. Then I call your attention to two lines, are those the outlines or the surface lines of the sacroiliac joint, that is, those marks indicate where the bones come together?

A. Yes, that is a blending of the shadows. It is impossible to see the exact joint.

Q. As you look into this picture, that is where the joint is located [fol. 142] where that shadow is?

A. Yes, sir.

Q. But as we were looking into that picture——

A. The same as the man is on his face on the table.

Q. Looking against his back?

A. Yes.

Q. How did you find the left ilium with reference to the right ilium as to the height?

A. The left ilium is lower than the right ilium.

Q. How is it in the normal person?

A. Normal person they are equal.

Q. Are you able to tell from Exhibit C how much lower the left one is, if at all?

A. The measurement on the plates is exactly three thirty-seconds of an inch, but that would be more in the individual than on that plate, because that is blended to a flat surface; probably be about a half inch.

Q. Calling your attention to Exhibit B, this is a picture of the upper part of the body and the thorax, ribs and so forth; this is a picture of the chest wall?

A. The entire chest.

Q. And the center of the picture is the shadow of the back bone?

A. Yes, that is blended above with the sternum or breast bone. The breast bone and back bone blend.

Q. And the upper part is towards the neck?

A. Yes, sir.

Q. Lower part is towards the sacrum?

[fol. 143] A. Yes, sir.

Q. And the short shadow on the left of this picture, what is that?

A. The first rib.

Q. Then they number one, two, three and so forth down to the——

A. Twelfth.

Q. And I call your attention to that shadow, what rib is that (indicating)?

A. That is the fifth rib.

Q. Is that the first rib you found crushed?

A. Yes, sir.

Q. And is the irregular place I am pointing to the place where it has grown together when it was crushed?

A. Yes; the ends are not together; one end is above, the other below.

Q. The part that is attached to the backbone is above the other part that is broken loose?

A. Yes, sir.

Q. Then the sixth rib is the one I am pointing to?

A. Yes, sir.

Q. How are those ribs grown together, is one in front or one above the other?

A. One is above the other.

Q. And the part that is attached to the back bone still is above the fragment that is broken loose?

A. Yes.

Q. And that is the same as to the seventh?

A. Yes.

Q. Eighth?

[fol. 144] A. Ninth. The tenth shows an injury, but the tenth has healed the way a rib heals when it is broken without crushing force. It heals nicely together.

Q. And is it in this space over which those broken ribs from the sixth down where the heart, or partly, is located, normal heart?

A. Yes.

Q. And that is also lung tissue underneath those ribs?

A. Yes.

Q. How close are those ribs normally to the lung surface?

A. There is a small space between, called the pleural cavity, a narrow cavity which acts as a means of expiration and inspiration.

Q. Where is the apex of the normal heart located?

A. In the fifth interstice.

Q. Is that what you call the top of the heart?

A. That is the lower end of the heart, the pointed end.

Q. Where is the upper end?

A. It blends in there. That is a picture taken from the back; shows the lungs before the heart.

Q. This does not show the heart outline?

A. No.

Q. Is the heart imbedded in or surrounded by the lung tissue?

A. It is surrounded by a sac which we call the pericardium.

[fol. 145] Q. What is outside of the sac and around the heart?

A. There is a space and outside of that is the lung.

Q. You spoke about the damaged lung tissue, the left lung, where is the damaged portion relative to the heart?

A. Just below the picture here we have of the diaphragm. That spot below that that looks light. The picture on the right looks black. That is the normal lung. There is air in that right lung. The picture on the left side in the lower posterior third in this picture shows that there is some air in that lung in the anterior portion, but the posterior third of that lung is light, showing there is no air in it, and the upper part of it is black showing it is full of air.

Q. And where the lung was damaged it is practically of no use?

A. You are speaking now of the first examination?

Q. Yes, the first examination in January?

A. It had some use in the first examination. There was some air coming into that lower portion.

Q. Speaking now of the lung and ribs, will you tell the jury what changes, if any, you found between that examination and the one in January, a little over two years ago?

A. There was some lung change, but this airless condition had advanced, somewhat, increased, got worse.

Mr. Palmer: Which examination?

Mr. Anderson: I am speaking of the September, 1921, examination. [fol. 146]

Q. How about the heart and the heart block in September, what changes, if any, did you find?

A. The principal change from the first examination on January 7th was in the heart muscle, what we call myocarditis, a weakness in the heart muscle.

Q. And passing from that, now, to your recent examinations that you have made preparatory to this trial, what changes have you found with reference to this left chest wall and contents?

A. The examination made February 2nd, 1923, was a complete examination, as his former examinations were. His clothing was removed from his entire body and he went through what we call a general examination. His history of the accident was not taken. We simply referred in the case file to his previous examination to ascertain that. The condition of his kidneys was gone into at the condition of his special senses and his nervous system. Then in the examination of his injuries as ascertained in the first and second examination just referred to, we find an injury to the left chest. This left chest injury consists of the fractures of the ribs from the 5th to the 10th, inclusive, and they were found healed in an abnormal position, overlapping, some to the extent of two inches and the union was firm in this position. The lung condition had increased. It was a great deal worse. The X-ray of the present examination shows that almost half of this lung in its posterior portion is devoid of air. And where there was air tissue that contained air we now [fol. 147] find a fibrous condition that is airless and is absolutely of no value as far as the purpose of the lung is concerned. We found in our previous examination that there was some displacement of the heart, which was not really a displacement, but a dilatation of the right heart towards the sternum, as the sternal line was extended about an inch. We find now that the apex beat which shows the left heart is displaced to the mammary line. The mammary line is an artificial line we draw from the nipple of the chest extending downward. Passing through the left nipple, the normal beat is an inch inside of this towards the right. The mammary line cuts the outer part of the apex, impulse. The heart sounds are feeble. His pulse was 86 as he was sitting down.

Q. What is the normal?

A. 72 for a man. Upon asking him to make exertion, that is, walking up and down the room—he could not hop on one foot as we like to have them, in order to increase the exercise, as it were, done for the purpose of finding what a heart will do under exercise—we found that in four times up and down a room about eighteen feet long and back again, about 130 feet of rapid walking, asked him to walk as rapidly as he could, that the heart beat went to 118.

Q. And what occurs under the same condition with a person in normal condition?

A. In a normal condition, slight exercise like that might increase your heart beat two or three beats and if you are in athletic training [fol. 148] I don't think it would affect it a particle, but I mean the ordinary business man on the street.

Q. Anything else?

A. No, I think that covers the chest injury.

Q. Why is it that he has this pulse beat so high as 86?

A. This heart is working against a lung in which the blood cannot pump as easily as it could if that lung were normal. That fibrous tissue that has taken the place of that lung in that posterior half forms a block, harder thing for the heart to pump against.

Q. When the heart is pumping and the lung is normal what is the heart doing in connection with the lung?

A. It is pumping blood through it, the right heart.

Q. When you speak of a block, what is that fibrous—

A. It meets resistance when it meets fibrous tissue in a lung of this extent.

Q. And why is it that the slight exercise you speak of causes the heart beat to go up to 118 or thereabouts?

A. The heart muscle is weakened from its continual strain. The heart is under a continual strain in a condition of that sort and when the man puts on himself any exercise his heart shows the flabby condition of its musculature which would not be there if it was in a normal condition.

Q. Why is it that the heart beat has changed its position, instead of being over to one side of this line you speak of it is an inch to the [fol. 149] other side?

A. Well, the heart when it is working against a load compensates itself, becomes larger, the chambers tend to stretch, the muscles tend to get larger and increase the diameter of the heart or the capacity of it.

Q. Then, just tell us as to the comparative conditions, whether the heart and lung and that region you found better, the same or worse than existed in September, 1921?

A. This was a great deal worse than it was in September, 1921.

Q. What, if anything, can be done to remedy the conditions or any of them, you have described around the chest wall and heart and lungs?

A. There is nothing that could be done to remedy this condition.

Q. And as you found that condition alone what, in your opinion, as to whether or not the heart is in a condition now to engage in actual labor requiring any particular muscular exertion?

A. He could not do manual labor.

Q. What danger, if any, confronts him in case of a sudden violent exertion, such as quick running or anything of that sort?

A. With a heart in this condition a sudden exertion might cause sudden death.

Q. Why?

A. By the over-loading of the heart.

Q. State whether or not, in your opinion, he ever will be able to work?

A. He never will be able to work.

[fol. 150] Q. And what is the prospect about his improving in the future so as to be very comfortable?

A. The chest condition will not improve, but I think it will become gradually worse, judging from the condition that has taken place from 1921 to 1923.

Q. You heard the testimony about the accident, of course?

A. I did.

Q. You heard all the testimony and his previous condition of health, never been hurt before except the right leg a little injured?

A. Yes, sir.

Q. Any question in your mind about the accident being the cause of these conditions you are describing?

A. No.

Q. Tell us the result of your present examination of his arm as compared to September, and January.

A. The arm from my examination of January 7th, and then the examination made the 8th of September, 1921, I thought there had been some improvement. I thought at that time that this arm would continue to get better. In that I was mistaken.

Q. How do you find it now?

A. The arm in the February 2nd examination shows an increase of the condition in the ulnar nerve. The ulnar nerve is the one which was hurt, coming down from the internal cord of the brachial plexus and supplying the inner part of the arm. The weakness of [fol. 151] the muscles or atrophy that has taken place has not been of a general character. The muscles to the outer arm, the outer cord, are in that condition of disuse that we would find in an arm that was not used. The belly of the muscle is not flabby and is not wasted away like the muscle that is supplied by the ulnar nerve. This wasting shows that there has been an intrinsic damage to this ulnar nerve. The muscles between the fingers, the lack of sensation on the skin of the little finger and the inner side of the ring finger continues. The motor part of the nerve that supplies the muscles that pull the thumb to the side of the hand are atrophied; they have no use then, no power. This patient grasps your hand, he sets his muscles with all his strength and he gets to a certain point and it sets in contraction, then all at once lets go. It is entirely different from the normal hand. The skin of this side of the hand (indicating) has a lack-luster look, dead pallor to it, not the healthy red of the normal hand, showing an interference with nourishment or atrophic condition of the hand from the injury to the ulnar nerve.

The arm has not decreased in the measurement, the actual tape measurement, from that time to this.

Q. What is the size of the arm as compared to the right arm?

A. The left arm above the elbow at the widest point measurement taken is an inch smaller than the right arm and the forearm is three quarters of an inch smaller than the right arm.

[fol. 152] Q. And how is the hand?

A. The hand is shrunken from the atrophy of his muscles and is smaller than the other.

Q. Any prospect, Doctor, of any improvement in that arm?

A. No, that arm is the same after the lapse of this length of time.

Q. About the usefulness of his left arm?

A. The grip is gone. This man tries to pick up anything of any weight it slips out of his hand.

Q. How did you find the sacroiliac joint and left leg in your last examination as compared to the other examination?

A. The physical injury has not changed. I think this man is a little more comfortable with his sacroiliac joint than he was two years ago as far as his physical pain is concerned. He has the same limp and walks the same as he did two years ago, but he has better control of the muscles that help him to fix this joint, but the joint is still in the same condition that it was at the time of the other examination.

Q. About the size of the leg as compared to the right?

A. That has not increased any in size. The upper leg is an inch and a half smaller, that is, the thigh, on the left side, than on the right, and on the lower or calf of the leg it is an inch smaller than on the right. That corresponds to the measurements I made in the previous examinations.

Q. Speaking with reference to normal legs, working man, is there [fol. 153] a difference frequently found between the left and right leg, thigh and calf?

A. No, I have never been able to find any difference.

Q. Lack of use of an injured limb will cause it to diminish in size as compared to a limb that is being used?

A. Yes.

Q. In this case the plaintiff has been using both legs; I think he said he discarded his cane in the summer of 1922; he used a cane for a year or more before that; and has been walking on his two legs since that; would that have anything to do with accounting for the difference in the size, what you call non-use, where he uses both legs and has been using them for a long time?

A. No.

Q. Then how do you account for this difference in the size of the two legs?

A. There has evidently been some nerve injury. The sciatic nerve is very tender in its entire extent, from its origin to where it comes down to the tendon achilles. Where you have a nerve disturbance of that sort you get more or less disturbance of the nutrition of a muscle and I think that would account for this man's condition in the lessened size of the muscle.

Q. Taking everything into consideration, what is the prospect of this left leg in the future

A. I think this left leg will remain as it is today. It hasn't made any particular improvement that I can see in the last two years, except I think he has not as much physical pain because he has learned to accommodate himself to the injury by the use of his [fol. 154] muscles.

Q. Speaking of the leg alone, you are familiar with railroad work in a general way, brakemen, up and down running board, climb up and down ladders and doing manual labor,—is this man's leg in such shape that he could do that?

A. No, sir.

Q. Is his left arm in such shape that he could do that?

A. No, sir.

Q. Will it ever be?

A. No, sir.

Q. That is, aside from his heart and lungs?

A. Yes, sir.

Q. Anything that can be done for the leg and arm to remedy the conditions?

A. No, sir, there is not.

Q. Are the conditions you found in the arm such that they would be likely to produce or cause pain at the present time.

A. I do not think that this arm would cause him much pain, that the painful stage is long past. If he made an effort to over-exert, that would be a muscle pain from the over-exertion of his muscles, but just speaking from the physical condition of the nerve.

Q. Does the pain remain with the sacroiliac joint injury as long as a man is lame or not?

A. Yes, in this way, that if you make a sudden movement, unguarded, or try to lift something that has any weight to it, you immediately get a sudden pain.

Cross-examination.

By Mr. Palmer:

Q. How many ribs in all on each side?

A. Twelve.

Q. And you number them from the top towards the bottom?

A. Yes, sir.

Q. The side of this picture towards me is the left side, is it?

A. Yes, sir.

Q. How was this picture taken?

A. From the back, from the rear, anterior posterior view.

Q. The man is lying on his face?

A. On his face, yes, sir.

Q. And the picture was taken from above him?

A. Yes, the light was suspended down and then the table arranged so that the plate is underneath the man.

Q. Which rib is it that shows the first injury here?

A. The fifth.

Q. How near to the neck do these ribs begin?

A. Well, they begin right below the dorsal vertebræ in the back bone.

Q. And what part of the back bone?

A. Twelve dorsal below the cervical, the neck back bones.

Q. The first vertebræ, then, that we have in the neck are called the cervical vertebræ?

A. Yes.

[fol. 156] Q. How many of those are there?

A. Seven.

Q. And then occur how many dorsal?

A. Twelve dorsal.

Q. And what are the next ones called?

A. The next are the lumbar.

Q. How many of those are there?

A. Five.

Q. What are the next ones?

A. Sacral.

Q. How many sacral vertebræ are there?

A. There are five blended into a sacrum, but they are blended. You cannot see the distinct portions of them, although we consider them as five sacral.

Q. Those five blended together——

A. Make the sacrum bone, yes, sir.

Q. Near which one of the dorsal vertebræ do these ribs begin?

A. The first dorsal.

Q. Then the first dorsal vertebræ, is it joined onto the first rib?

A. No, the rib facets. There is a little movement, a little rubbing space into which the rib fits towards the vertebræ.

Q. Towards the first dorsal vertebræ?

A. Yes.

Q. Then there are how many dorsal vertebræ?

A. Twelve.

Q. And twelve corresponding ribs?

A. Yes.

[fol. 157] Q. Those ribs are not attached to the dorsal vertebræ, are they?

A. Yes, they are attached by ligaments, but they are not grown solid.

Q. They are attached by ligaments to the twelve dorsal vertebræ?

A. Yes, on a facet surface.

Q. Then when the dorsal vertebræ end the ribs end?

A. Yes.

Q. And then comes the lumbar vertebræ below that?

A. Yes.

Q. How many of those?

A. Five.

Q. Then comes your sacrum?

A. Yes.

Q. Composed of how many vertebrae?

A. Well, those five vertebrae blended make one bone. You would not speak of them as separate vertebrae because it is hard to tell the separation.

Q. Then between these dorsal vertebrae and the beginning of the sacral vertebrae or sacrum there are five lumbar vertebrae?

A. Yes.

Q. And about how wide are those lumbar vertebrae up and down?

A. Well, they vary according to the man from an inch and a half to an inch and a quarter, an inch.

Q. Each?

A. Yes.

[fol. 158] Q. And that would be five times an inch and a half or an inch and a quarter?

A. Or an inch; depends on the stature of the man.

Q. Well, in this man as you see the picture here?

A. Well of course I have no means of measuring the exact length of the lumbar vertebrae just simply an estimate in my mind. About an inch I would say.

Q. Then it would be at least five inches?

A. Yes, sir.

Q. From the end of the dorsal vertebrae down, and how wide are these dorsal vertebrae?

A. I don't know. I have never measured a dorsal vertebrae. I should imagine they would be about the same. You are speaking of the length, now, aren't you?

Q. Yes?

A. Up and down.

Q. Posterior and anterior?

A. I should think they would be about an inch.

Q. And the last rib that received an injury was which one?

A. The tenth, but that tenth rib was not hurt very much because it is a floater. They are not fastened in the front.

Q. That did not receive much of an injury?

A. No, you cannot injure the floaters very much because the front of them are loose.

Q. Which is the last one that is not a floater?

A. The ninth is the last. The tenth, eleventh and twelfth are floating ribs.

Q. Then there was no injury to the eleventh?

[fol. 159] A. No, sir, that I could ascertain by palpation or by X-ray examination whether there is injury or not.

Q. Well, then, the 11th and 12th and the 10th, I understand you to say did not have any crushing?

A. No.

Q. So that the first one that had any crushing was some seven inches above the beginning of the sacrum?

A. The first is the fifth.

Q. I mean the first one going up, Doctor, the first going up would be the tenth?

A. Yes.

Q. And that would be some seven or eight inches above the sacrum, wouldn't it?

A. Yes.

Q. And then the tenth had the least injury; the ninth have very much of an injury?

A. Yes, the ninth, eighth, seventh; the worst injury is the sixth. The most force was expended on the fifth, sixth, seventh and eighth. And the ninth had quite a little force on it, but the most force was evidently expended on the fifth and sixth judging from the condition.

Q. And that would be some ten inches above the sacrum?

A. Yes.

Q. That the most force was evidently exerted?

A. No, that would not be true. That is the most prominent part, you see, and of course the most prominent part would get the most [fol. 160] violence expended on it, but it would not be that the most force had been applied there, only that that is more vulnerable, being more of an arch and being more amenable to the application of external violence.

Q. At any rate it received the most external violence of any?

A. The most impact, being the most prominent part.

Q. The fifth, sixth and seventh ribs, Doctor, would be pretty well up under the arm, speaking from a practical standpoint, would they not as they extend around the body?

A. Yes.

Q. How far from the back bone did these breaks evidently occur?

A. About an inch and a half. Some are broken off closer than others.

Q. Evidently you think, in accounting for this condition, he struck on those ribs on a timber and just simply crushed them off?

A. Yes.

Q. Then your idea is, Doctor, that these ribs, the fifth, sixth, seventh, eighth and ninth ribs, being the most prominent on that side, striking on the timber received the greatest force?

A. Yes, there is more of a curve there and brings them out further from the body than the other ribs. You see, as we come down here the chest narrows to the floating ribs and there it becomes much narrower than it is up in the upper portion, so the tenth would not [fol. 161] get nearly the fracture, and of course, being loose on one end, it is very difficult to break a thing that is not fastened on both ends.

Q. There are how many of the floating ribs?

A. Three.

Q. You found nothing wrong with these twelve dorsal vertebræ?

A. No, I did not.

Q. And of course you found nothing wrong with the cervical vertebræ, the vertebræ above?

A. No, I did not.

Q. And you found nothing wrong with the lumbar vertebræ below?

A. There was some pain that showed some strain, you know, of the ligaments there, but there was no physical injury that I could ascertain by means of an X-ray, but he had what we call a strain in the lumbar region, of the lumbar muscles and ligaments. That would be impossible to show on the picture. There was nothing wrong with those bones.

Q. Nothing wrong with the vertebræ themselves?

A. No, but there was an injury to the lumbar region that would be impossible to show by an X-ray.

Q. A strain?

A. Strain of the ligaments and the muscles because he was very tender in that situation.

Q. Now, down past these five lumbar vertebræ begins these sacral vertebræ, the five that are blended in the sacrum?

A. Yes.

[fol. 162] Q. That sacrum that is down in between the side of the ilia?

A. Yes, the inner side of the ilia is contiguous to the sacrum.

Q. And what vertebræ are these directly opposite the two crests of the ilia?

A. That is the lumbar vertebræ.

Q. Where do these sacral vertebræ begin?

A. Right after the last lumbar.

Q. Where they appear to merge into the back bone, as I will call it, at which vertebræ is that merger?

A. That would be the 5th lumbar off the sacrum.

Q. Then, right here, Doctor, begins your sacrum, and this synchondrosis?

A. Of the sacroiliac region, sacroiliac synchondrosis.

Q. What is the articulation or union between the sides of the ilia here and the sacrum?

A. There is a fibrocartilage between that that doesn't show in an X-ray plate. You cannot show really the union of these two because of the fibrocartilage of the pseudo joint or false joint.

Q. Can't you see that?

A. No, not in an X-ray. It has a different density than bone has. Fibrocartilage does not show up. That is what makes our pictures imperfect of this region.

Q. Is there anything there besides this cartilage that makes that union, are there any little joints?

A. No. There is no joint there, all false joints, little prolongations [fol. 163] on the sacrum, on the side of the blended vertebræ.

Q. Now, all the way down here we see little projections on the side of these vertebræ, don't we?

A. The transverse processes.

Q. And those continue down in these little vertebræ that blend into the sacrum?

A. No, having lost their function they become wasted away, but there are little knobs that show where the transverse process had been,

but there is no use for transverse processes there so nature has got rid of them.

Q. But there are little knobs?

A. Little knobs of bone that are the remnants of the transverse processes, evidently.

Q. Now, these little protuberances of bone, what do they stick into?

A. Well, they are fastened with ligaments into the side of the ilium.

Q. And they fit into little notches, don't they, or little depressions?

A. No.

Q. Is there som-thing there to accommodate those little notches?

A. No, there is not.

Q. They do not articulate with anything?

A. No articulations there.

Q. Nothing whatever to accommodate that bone?

A. Except there is a fastening for ligaments.

Q. Do they press against the ilium?

A. No.

Q. Can you see them by means of the X-ray?

A. No.

[fol. 164] Q. Nobody ever saw them?

A. I never saw them in any X-ray picture.

Q. And this sacrum, I suppose there is some little line that can be seen there of demarcation?

A. No, you cannot make out the demarcation.

Q. There is none?

A. It is a blended line. The anterior and the posterior lines are not even the same as you would take two faces on a plate, you would see two outlines.

Q. Could you by means of the stereoscope?

A. No.

Q. Couldn't see that at all?

A. No, because these lines are blended.

Q. At least, you see the blended lines, do you?

A. Yes. You do not see a line. You see an irregular shadow. It is not a fine line.

Q. Well, isn't that all you see in any X-ray, is the shadow?

A. Yes, a shadow as distinguished from a line, from a sharp demarcation.

Q. On which side is it your opinion that there is this sublaxation?

A. The left side.

Q. And what do you mean by sublaxation?

A. Sublaxation is a loosening of the joint and a falling of the ilium away from its contiguous surface.

Q. How much of a sublaxation do you think there is?

A. About half an inch.

Q. Now, I am pointing to what you say is the shadow cast by the [fol. 165] line between the ilium and the sacrum, Doctor, I will point to the top of it?

A. Yes.

Q. Do you see anything there that indicates a subluxation?

A. No, I do not.

Q. Now, I point to the bottom of that same shadow, do you see there anything irregular or any discrepancy whatsoever in the bottom of that line?

A. I do not.

Q. It is perfectly smooth?

A. Perfectly blended.

Q. Yes, and the top is likewise perfectly smooth?

A. Perfectly blended, yes.

Q. Now, I notice a very slight discrepancy or a slight difference over here on the right side?

A. I do not.

Q. At the bottom there?

A. No, I do not. You might guess that there is a separation on that other side at the bottom, the left side.

Q. How did you figure out this half an inch, Doctor, that you spoke about?

A. The measurement on the plate is three thirty-seconds that his left is lower than the right.

Q. That is, on the right hand side you took the crest of this ilium?

A. Yes.

Q. And then you measured and you made a straight line across, did you?

A. Yes.

Q. To the crest of this ilium shown here?

[fol. 166] A. Yes.

Q. And you found three thirty-seconds of an inch?

A. Yes.

Q. This is a representation of this man's back?

A. Yes, but it is not the exact size of his back.

Q. Well, is it the best you could get?

A. Yes.

Q. And it shows a difference, the crest of this left ilium about one-eleventh of an inch lower than the crest of the ilium on the right?

A. Yes.

Q. Now, where do you get your half inch?

A. I figure that from the picture and the relation to the body.

Q. You figure it?

A. Well, estimate.

Q. And what are your estimates based on, where are your figures you base the estimate on?

A. That is an opinion that I formed from the displacement of the ilium in a blended shadow on a plate, showing blended or contiguous surfaces and taking in its relation to the normal body.

Q. Have you made those measurements?

A. Made measurements on the plate.

Q. Have you made measurements of the normal body and then compared them with measurements on an X-ray plate?

A. No.

Q. You never have?

A. No.

[fol. 167] Q. Then how do you know the relation between the measurements on the normal body and the measurements on the X-ray plate?

A. I am simply estimating it from the displacement on the plate.

Q. Estimating it?

A. Estimating it.

Q. How much displacement is there?

A. I say there is half an inch in the body of Mr. Gonceau.

Q. You say in the normal man they are about an inch wide; take this picture and what does it show the width of those vertebræ?

A. Between a third and a half an inch.

Q. Take the one on the rib, you say here it was about an inch wide in a normal person?

A. About that, I should think.

Q. What does your plate here show the width of that?

A. About half an inch.

Q. That is all?

A. That is on the blending of a flat surface; it is always a distortion of the normal relation.

Q. Aren't they shown, as a matter of fact, on this picture at just almost exactly one inch?

A. No. I don't think so.

Q. I will measure them with this pencil; how much is that?

A. I don't know what that is.

Q. You don't know whether that is an inch or a half inch?

A. I do not?

Q. Then you think these here show about half an inch wide?

[fol. 168] A. Yes.

Q. When, as a matter of fact, in the normal body they are about an inch?

A. I would say about an inch. I have never measured them.

Q. Then the distortion, in your judgment, is about half?

A. No, when you measure it you take in the blending of the fibrocartilaginous substances as well as the bony substance that makes up the spinal column.

Q. How wide do you think that actual shadow is there of that bone?

A. I don't know.

Q. How high do you think that ilium is from this hip joint up to the top of it?

A. I don't know.

Q. Do you know anything about how high it is in the normal person?

A. I do not.

Q. Do you know anything about how high it is as shown on this picture?

A. I do not.

Q. Then how do you establish any relation between the normal person and these shadows as shown here?

A. When we make our estimate we do not do it exactly from the picture alone, but from the entire facts our physical examination of the patient and taking the X-ray as a minor consideration in our [fol 169] physical findings in order to make an estimate of half an inch of displacement of his ilium, from the limp of the patient and from his physical examination, not entirely from this X-ray plate. You are asking about my estimate now. That is not made by measurements.

Q. All right. Then your estimate is made without any knowledge of the actual, true measurement in the normal person and without any knowledge of the actual, true measurement as shown by the picture?

A. Absolutely.

Q. Absolutely?

A. Yes, sir.

Q. And it is made partly, then, you say, upon what he said?

A. No, not what he said about his limp; what I saw him limp.

Q. Is there anything upon this X-ray picture whatever, except that one eleventh of an inch difference between the crest of the ilium on the right side and the crest of the ilium on the left side to show that there is any subluxation or displacement whatsoever in the sacroiliac joint?

A. No.

Q. The ilium is the upper part of the leg, isn't it, the leg bone?

A. No. It is the side part of the pelvis.

Q. What joins onto that?

A. The leg bone. Femur.

Q. Do you say in the normal person, Doctor, that their legs are exactly the same length?

A. Yes.

[fol. 170] Q. That is the way they are born, with their legs exactly the same length?

A. Yes.

Q. And through life they continue the same length?

A. I should say so, if there is nothing to change them.

Q. In a normal individual, then, the legs are exactly the same length?

A. I would say so, yes.

Q. And the crests of their ilium would be exactly on a level?

A. Yes.

Q. With every normal person that is the way they should be?

A. Yes.

Q. And there should not be a difference even of one eleventh of an inch?

A. No.

Q. And if they did it would indicate a subluxation of the sacroiliac synchondrosis?

A. Yes.

Q. If there was a difference of one eleventh of an inch?

A. Yes.

Q. It is not possible, is it, to tilt the pelvis a little to one side?

A. When you are standing on your feet, yes.

Q. That is, you can pull one leg up?

A. Yes.

Q. And would that raise that crest of the ilium on that side a little bit?

[fol. 171] A. Distort the entire picture. Your back bone would be slanting.

Q. Suppose you just pull the leg up?

A. You could not do that unless you would tip——

Q. You could not raise the crest of the ilium a particle?

A. No, not a particle.

Q. Not standing on your feet even?

A. No.

Q. If you were lying down on your face you could not jerk your leg up a little and raise the crest of the ilium?

A. Not without distortion of the spinal column. You could distort the spinal column, but you couldn't distort the relation between the spinal column and ilium. You could twist the spinal column so it would be slanting instead of straight.

Q. You couldn't jerk your leg up a little while you were lying on your face?

A. No, not without distorting the spinal column. You could not raise the crest of the ilium. You could distort the spinal column, but you could not raise the crest of the ilium.

Q. Not even by bending a little?

A. No.

Q. You could not tilt the pelvis a particle?

A. No.

Q. The sacrum and the ilium are bound together by strong ligaments?

A. Yes, sir

Q. How many of those ligaments are there?

A. There is quite a number of them. The anterior and the posterior [fol. 172] terior which are the intrinsic ligaments and then there are two extrinsic ligaments on the outside, but the main binding part of the joint is done by intrinsic ligaments on the anterior portion and the posterior portion. Anterior ligament and the posterior ligament and the greater sacrosciatic and the lesser sacrosciatic.

Q. Isn't there quite a network of ligaments in there?

A. Yes, they are all blended, make the anterior and posterior ligaments.

Q. Making a sort of heavy, solid network of ligaments?

A. Yes.

Q. Those ligaments are of some strength?

A. Yes.

Q. That is a rather important part of the body?

A. Yes.

Q. And nature has made it very strong?

A. It is very susceptible to injury. It is one of the weakest points of the anatomy that is subject to strain.

Q. And for that reason nature has made it strong, hasn't it, with these ligaments; these are powerful ligaments, are they not?

A. Yes. They are not so very heavy, but they have strength.

Q. Their natural tendency is to hold those bones firmly together so that they cannot move up or down?

A. Yes.

Q. That is not a joint, then, in the sense that it moves up and [fol. 173] down?

A. No, it isn't a joint.

Q. In order to get that falling or movement downward you would have to displace those ligaments?

A. No, you would have to tear them.

Q. Tear them right in two?

A. Yes, have to tear enough of their fibers in order to get a separation.

Q. Would an examination show whether they were torn or not?

A. No, it would not.

Q. Would there be any depression there or anything to show?

A. No, there would not.

Q. Look like a dimple?

A. No, there would not.

Q. Any little depression there or dimple in the back would not indicate a separation of those ligaments at all?

A. No, sir.

Q. Is there anything that would indicate a separation of those ligaments?

A. Physical examination.

Q. Did you find any objective symptom that indicated an injury to those ligaments?

A. Yes.

Q. What was it?

A. Abnormal tenseness or setting of the muscle by various movements on the part of the leg, and abduction and adduction of Mr. Gouneau's leg.

Q. That is just moving his leg around?

[fol. 174] A. No.

Q. And the setting of the muscle?

A. Yes.

Q. Hunt around there, you couldn't feel a thing, could you?

A. No.

Q. Out of place or wrong with those ligaments?

A. No.

Q. Do those ligaments come right up there onto the surface, under the skin?

A. No.

Q. What is there next to the skin over those?

A. Next to the skin is fibrous tissue, connective tissue, fat.

Q. How wide is that?

A. I don't know. I never measured it.

Q. How thick is it?

A. I don't know.

Q. By palpation you could not find anything whatever wrong with those ligaments?

A. Except from the setting of the muscle of the patient, tenderness, that is not in normal muscles.

Q. And when you moved his leg around?

A. Yes, and when we palpated.

Q. When you were pressing there?

A. Yes.

Q. Did he complain of pain?

A. Yes.

Q. And the muscles kind of set?

A. Yes.

Q. But otherwise, you cannot feel anything?

[fol. 175] A. Cannot feel the ligaments, no.

Q. Did you feel any movement or motion in this joint at all?

A. No.

Q. Couldn't do that?

A. No, because the muscles set; keeps it from moving.

Q. Well, if there was a movement there of a half an inch, as you estimate from your eleventh of an inch difference, in the height, couldn't you have detected it by palpation?

A. No.

Q. In your judgment, it could not be detected at all?

A. It could not be detected, no.

Q. This location of the heart was about an inch towards the sternum?

A. Yes.

Q. Rather than normal?

A. Yes.

Q. You did not mean the whole heart?

A. Right side of the heart.

Q. You mean the upper part or the lower part?

A. Well, those parts of the right, the upper part and the lower part.

Q. Well, I suppose that the left went over with it, didn't it?

A. Yes, but one set of chambers can dilate and become different than the other.

Q. But the right heart would not go over to the right side an inch unless the left heart went with it, would it?

[fol. 176] A. No.

Q. Or the left heart go over an inch without the right heart?

A. No, that is a dilation of the right heart.

Q. Then what you mean is that the whole heart was not displaced, but simply that the right heart had dilated to accommodate itself to this additional work, so that the side of it came over there an inch?

A. Yes.

Q. To the right of the mammary line?

A. No, sternal line.

Q. What did you say about the mammary line?

A. That is the left heart.

Q. Was that over too?

A. No, that was the first examination.

Q. That was where it belonged?

A. Yes.

Q. And it was and is now simply an enlargement of that right heart to accommodate itself to this additional work of pumping blood into the left lung?

A. Yes.

Q. And likewise the right lung would accommodate itself to taking in more air, wouldn't it?

A. Yes.

Q. On account of this loss of use of some part of the left lung?

A. Yes.

Q. And the right lung is consequently larger than it was prior to this injury?

A. No, it is not larger, but those air cells are dilated.

[fol. 177] Q. Take the left lung, there would be air cells to what proportion of the air space, in your judgment, left there?

A. About a half. That is, on the later examination, made on February 2nd.

Q. Does that handle more air? It would have more air cells to accommodate itself to the disuse of the other portion?

A. No, it does not, because this left lung, being the damaged lung, besides the destruction of the tissue, you have adhesions that have extended to some portions of the other lung that prevent dilation of those air cells as you get in the right lung.

Q. What has caused any additional destruction of these air cells in the left lung since the injury healed.

A. This fibrous condition that has kept on and got a great deal worse since the previous examinations.

Q. You mean the healing process has gone on and that has destroyed the air cells?

A. Yes, the damaged portion of the lung has gradually been replaced by fibrous tissue.

Q. And what had caused this damage?

A. The laceration of the lung by the ends of the ribs and possibly some contusion at the time of his falling.

Q. Going back to this lung matter, do you mean when you made this first examination you found only about a third of this lung tissue that was impaired?

[fol. 178] A. That is all the X-ray showed at that time, but there was rales and dullness along the edge of the flatness. Flatness would show that the air was entirely out; dullness would show that it was impaired. His lung was impaired to a greater degree than the X-ray showed was entirely gone.

Q. Was about half of it impaired at that time?

A. As nearly as I could judge there was dullness extending to about that extent from the actual flatness that we found in the posterior third.

Q. About half?

A. That is, counting the posterior third.

Q. And this flatness or dullness indicated that it was not in use?

A. No, the dullness shows there is still some air there. The flatness shows that there is no air there.

Q. And was it doing ordinary duty then?

A. No.

Q. There was then about the same proportion of disuse that you found next?

A. No.

Q. You think there was some use, then, of that part?

A. Oh, yes, there was use of that dull area, but not in the full area.

Q. And instead of that dull area going on and clearing up and nature healing it and getting air cells back into it, why, they went out?

A. Yes. Fibrous tissue took its place.

Q. What did you find on this left leg in the way of objective symptoms, other than the difference in the measurement?

A. The limp of the patient as he walked up and down the room. He threw his body to one side. Asking him to walk, I observed that he walked and he set certain muscles around his hip and pelvis. Those muscles did not have the free play that the muscles in the lower part of the leg had.

Q. You could see what he did when he walked up and down the room?

A. Yes.

Q. What objective condition was it that you could see or feel to show that there was anything wrong with that left leg?

A. Just the lack of tone of the muscle, the wasting away of the muscle. Outside of that there was nothing.

Q. No bruise?

A. No.

Q. Or depressions?

A. No.

Q. Or anything of that kind?

A. No.

Q. And likewise, in this left arm, aside from this atrophy, and his statement that there was a loss of some sensation in there, what was there that you could see or feel about that left arm?

A. Nothing outside of the wasting of the muscles on the inner side of the arm.

Q. Wasting of the muscles comes from disuse, does it not?

A. Not of certain sets of muscles. Disuse wastes all the muscles. [fol. 180] An atrophic waste is from certain sets of muscles; certain muscles of his arm were wasted and certain were not.

Q. Ordinarily and in the normal individual, Doctor, isn't it of frequent occurrence that the right arm will be slightly larger than the left?

A. Yes, in right handed men, especially a laborer.

Q. This man is a right handed man, you heard that testimony?

A. Yes.

Q. And the slight atrophy or wasting of certain muscles of which you speak and the difference in the size of the arm and the hand not being the usual ruddy color was all you found?

A. And the lack of sensation about the distribution of the cutaneous branches of the ulnar nerve.

Q. How did you determine that?

A. By passing over it grosser objects and finer objects, like pieces of cotton and a pin, ascertaining the blunted sensation.

Q. And then took his statement for what the sensation was?

A. Yes.

Q. Otherwise, there was nothing objective there that you could see or feel?

A. Outside of the wasting of the muscles supplied by the ulnar nerve. That is all you could see.

Dr. H. E. WEBSTER, on behalf of plaintiff, duly sworn, testified as follows:

[fol. 181] Direct examination.

By Mr. Anderson:

Q. Your first name, Doctor?

A. H. E. Webster.

Q. You reside in Duluth?

A. Yes, sir.

Q. Practicing physician and surgeon?

A. Yes, sir.

Q. Licensed under the laws of this state to practice in that profession?

A. Yes, sir.

Q. Graduated from what medical college?

A. Toronto University.

Q. You originated in Canada?

A. Yes, sir.

Q. How old are you, Doctor?

A. Fifty-eight.

Q. How long have you been practicing your profession?

A. Over thirty years.

Q. All the time in Duluth?

A. I have been over thirty years in Duluth.

Q. Taken any medical course except in the college?

A. No, sir.

Q. Doctor, you have, at my request, made examinations of this plaintiff from time to time for the purpose of ascertaining, as best you could, his physical condition and troubles?

A. Yes, sir.

Q. You examined him prior to the time he came here in his trial a year ago last September?

[fol 182] A. Yes, sir.

Q. And at that time how many times did you see and examine the plaintiff before that trial?

A. Well, at least half a dozen times.

Q. He was under your observation for some time, came over from Superior?

A. Yes, sir.

Q. Did you examine him in connection with this trial at my request?

A. Yes, sir, about two weeks ago.

Q. And you took part in the examinations here in Bemidji that were being made in connection with Dr. Jamison, who has not appeared in this case?

A. Yes, sir.

Q. The examinations that you made that I have referred to, were those cases where you had the man strip and made what we call a thorough examination of the parts in question?

A. The first examination in 1921.

Q. How about your examinations made in connection with this trial that you made at Duluth, were they full, complete examinations, again?

A. Yes, sir.

Q. Tell us about your observations all the time you had him before September, 1921.

A. At the first examination, after being given the history of the case, I stripped him and noticed that the left side was apparently driven in, a large hollow space to the left of the scapula, which made me suspect that the scapula was fractured and that part of the ribs were fractured. The scapula is the shoulder blade. The examination of the whole of that chest showed a dullness in the lung and also a little heart displacement towards the sternum, to the right. Then the left arm showed injury to the brachial plexus. That is the nerve endings that are under the arm and form a plexus of nerves which are distributed down the arm to the muscles and skin of the arm. The particular nerve affected in this case seemed to be the ulnar nerve which has a double function of sensation and motion. The sensory part of the nerve supplies both sides of the little finger and the inside of the ring finger. This showed evidence of injury in the fact that there was numbness there. There was also at that time some atrophy of the muscles of the palm of the hand which are supplied to a large extent by the ulnar nerve. The leg injury, at that time there were not many objective symptoms by which one could determine exactly what was the nature of the injury to the leg, but from previous experience and from the location of the pain and the tenseness in the muscles, I concluded that there was injury to the sacroiliac joint.

Q. And what is your conclusion as to the nature of that injury to the sacroiliac joint?

A. Well, it would be hard to tell just exactly what the nature of that injury was, but there was at least a severe strain.

Q. You are still speaking now of your examination made a year and a half ago?

A. 1921, yes.

Q. At that time he was using a cane?

A. Yes, sir, he limped.

[fol. 184] Q. Did you test the strength of his hand in any way as best you could to give some conclusion as to his muscular power in that left arm?

A. Yes, there was lack of strength. Very apparent.

Q. You testified in this case at the last trial?

A. I did, yes.

Q. And you saw and became familiar with Exhibits B and C?

A. Yes, sir.

Q. Do Exhibits B and C verify your diagnosis of the case without X-rays?

A. Yes, sir, I think they do. B certainly does. C would not seem to carry out the idea of the sacroiliac joint strain and you would not expect it to do so.

Q. The X-ray would not show the strain?

A. No.

Q. By the way, did you at that time test by abduction and adduction?

A. Yes.

Q. How did that pan out?

A. It was very painful to do those things and flexion of the thigh upon the abdomen was absolutely impossible because of the pain.

Q. Was that one of the well recognized tests to diagnosis of sacroiliac injury?

A. Yes, that is one of the tests used and also I tested the tension of the muscles that would be apt to be affected by such an injury and they were tense and painful particularly the pectineus muscle.

Q. Those are in front here?

[fol. 185] A. Yes, sir.

Q. What would that indicate, having tenderness there?

A. Well, it would indicate that there was some irritation to the muscle and probably due to strain or sprain of some kind, either at its origin or insertion.

Q. Well, were you satisfied after all your investigations and when you saw X-ray C for what it is worth on that, that the plaintiff had a sacroiliac joint injury?

A. I was very thoroughly convinced that he had, yes.

Q. You have gone into that question of sacroiliac joint injury in connection with this trial and made examinations?

A. Yes.

Q. Made your tests?

A. Yes, sir.

Q. Has he got that injury, in your judgment?

A. It seems to be very nearly the same as it was on the previous examination.

Q. And when you consider the time that has passed, two years and nearly a quarter, what is your opinion as to whether that leg will ever get materially better in the future?

A. Well, I think it will improve some. He will be able to manipulate those muscles, I think, better after a while and he will get inured to the new conditions and he will be able to handle himself better.

Q. Become accustomed to the pain in time?  
[fol. 186] A. Yes, he will.

Q. Will the leg ever become so, in your opinion, that he can go out and use that leg in the performance of manual labor where it requires being *of* his feet, walking, moving at times rapidly, lifting and straining?

A. I do not believe that will be possible for years, if ever.

Q. How did you find the arm now as compared to your investigation a year and a half ago?

A. There is more atrophy of the palmer muscles. The sensitive part of the nerve does not seem to be involved to such an extent because feeling has returned to a certain extent in the fingers supplied by that nerve.

Q. How about the size of the arm?

A. The arm itself is about the same size in relation to the other arm as it was at the time of the first examination.

Q. And what were those relative measurements?

A. About in the neighborhood of an inch less.

Q. Ordinarily with a working man is the right arm frequently slightly larger than the left?

A. It depends upon the kind of work. Some work requires as much use of the left arm as it does of the right arm. Under such conditions you would not expect any material difference.

Q. But when you do find differences that way, is the difference anything like an inch or three-quarters of an inch or is it a slight difference?

A. Well, it is not nearly so much as that.

Q. And is the atrophy you speak of in this arm atrophy that could [fol. 187] be accounted for simply by nonuse of the left arm?

A. No. It is not that kind. Otherwise all the muscles would be equally affected.

Q. How did you find them here as to being equally affected or some more than others?

A. It seemed to be the group of muscles particularly supplied by the ulnar nerve.

Q. What does that mean to you?

A. It meant that the ulnar *nerve* was injured.

Q. You have heard the testimony about this accident?

A. Yes.

Q. And the testimony about his previous condition of normality?

A. Yes.

Q. Do you have any doubt about this accident being the cause of these conditions you are talking about?

A. None at all.

Q. How about the usefulness of the arm as you found it, working, railroading?

A. I do not believe he could do that work at all.

Q. What is the prospect in the future as you find the arm now?

A. Very doubtful.

Q. Is that arm weaker or less useful now than it was a year and a half ago?

A. I think it is.

Q. Is there anything upon which you can base any hope of improvement from now on, in the future?

A. After this length of time it would seem that it is impaired beyond hope of recovery.

Q. How about the condition of the chest wall, lung, heart, at the present time, as you found it, Doctor?

A. Well, take the heart first. The area of cardiac dullness has increased. By palpating over the heart area you find an increase in the area of that dullness. The apex beat at this time instead of being one inch towards the sternum is from an inch to an inch and a half to the right and outside the mammary line.

Q. What has been the cause of that change?

A. That change has been caused by the fact that there has been some obstruction to the free flow of blood from the heart to the lung and that consequently, in order to take care of that, the muscles of the heart have increased in size, as always happens under such conditions, and that, taken in connection with the condition of the lung which has shrunk, has forced over to the side of less resistance, to the left side, and consequently the apex beat is that much out of line. That is, an inch and a half maybe.

Q. How about the lung?

A. The lung itself, the area of dullness in the lung seems to have increased also. There is more of the lung out of commission now than there was a year and a half ago.

Q. Do you remember how much you estimated the part of the lung that was useless at that time?

[fol. 189] A. We estimated that there was about a third, I think.

Q. How much of it useless now?

A. Well, it looks to be about half.

Q. What do you call the trouble in connection with the lung and the heart, making this heart labor by pumping.

A. Heart block.

Q. What effect does this condition in the lung and the heart and the difficulty in pumping, take it altogether, have upon the plaintiff, in your judgment, with reference to the existence or non-existence first of pain?

A. Well, I think he would have a little pain in that heart.

Q. How about when he over-exerted or exerted himself quickly or a little violently?

A. Any over-exertion he surely would have.

Q. Are the conditions there, in your judgment, such as to produce danger if he should violently exert himself?

A. Well, I think there is some danger, all right, yes.

Q. Taking the heart and the lung and the conditions there alone, irrespective of the leg and arm of the plaintiff, is the plaintiff, in your judgment, able to perform manual labor now?

A. No, sir.

Q. Will he ever be?

A. In my opinion, he won't be.

Q. Will he improve in that region in the future?

[fol. 190] A. I think not.

Q. And how about whether he will remain stationary, in your opinion, or grow worse?

A. Well, I thought that it would be stationary in my first examination of him in 1921.

Q. What is your opinion now?

A. I don't know whether it will remain stationary or not.

Q. It is worse than it was a year and a half ago?

A. Yes.

Q. Then, assuming that the plaintiff had an education so that he could do those things, what could he do now in the future the rest of his life?

A. Well, he could do some clerical work.

Q. You are somewhat familiar with railroad work, brakeman, climbing up and down cars, running over cars, coupling and uncoupling, handling freight, manual labor, straining muscles, could he do any of those things?

A. No, sir.

Q. Will he ever be able to do it?

A. He will not.

Q. You took this picture, Exhibit D with the X-ray man?

A. Yes, sir.

Q. Was there when it was taken and know it is a picture of this man's chest wall?

A. Yes, sir. It was taken about two weeks ago.

Q. Referring to Exhibit D, where is it that Exhibit D shows destruction of the lung tissue?

[fol. 191] A. Around in here where the white specks show with the dark back ground.

Q. Exhibit E is a picture of what part of the anatomy?

A. That is a picture of both sides of the chest, with particular reference to the heart here.

Q. Calling your attention to Plaintiff's Exhibit E will you please point out the outline of the heart?

A. The heart is enlarged. You could not see any displacement of the heart from there.

Mr. Anderson: I will offer that in evidence.

Mr. Palmer: No objection.

(Plaintiff's Exhibit E received.)

Cross-examination.

By Mr. Palmer:

Q. With reference to this Exhibit D, how does that picture show the condition of the lung?

A. There is a density there and the shadow does not show up. That light area is the area of the injured lung.

Q. At the back?

A. Yes, sir.

Q. And the black portion, what is that?

A. Well, there is air there; that is functioning.

Q. Does the fact that this light area shows there indicate that it is injured lung?

A. Shows a fibrosis or consolidation of the lung.

Q. Did you find anything wrong with this man's right lung?

[fol. 192] A. No, sir.

Q. Was that all functioning?

A. Seemed to be, yes.

Q. Then what causes this light spot over here in that (indicating)?

A. Oh, well, I don't know. Probably it might be calcification of glands.

Q. On the right side?

A. Yes, sir, in the mediastinal glands. With an infection there it might easily happen.

Q. Why might it not indicate it just as well on the left side?

A. Because there is too much area there involved. Glands would show up just the same, just exactly the same as that if there was a sufficient number of them.

Q. Some of it might be glands then?

A. Well, there probably are a few glands there, yes.

Q. And some of the fibrous tissue, is that what you call it?

A. Fibrous, yes.

Q. Now, you do not mean, Doctor, that this lung is impaired all the way through? You mean that this fibrous tissue is on the back side where these ribs were broken, breakage of tissue?

A. Well, so far as I can see, the air does not seem to be passing on the front very well there in that lung. I examined him particularly as to that and I think the lung is fibrous right through.

Q. Doesn't it appear to be dark in the front part here?

[fol. 193] A. I think it is pretty light.

Q. Well, there are dark spots there?

A. Well, you have got spots there, dark spots, yes, which show air.

Q. It is pretty light right up here at the top part of the right lung, too, isn't it?

A. Yes, some light spots there.

Q. Well, now, what about the right lung, you found that all right?

A. I think the right lung is all right, absolutely.

Q. The ordinary person in just ordinary breathing does not use all of the air space of his lung by any means?

A. That is very true, yes.

Q. And about what proportion does he ordinarily use?

A. Oh, I suppose about one-third is used maybe, under ordinary circumstances; maybe not quite so much.

Q. And when there is anything wrong, then, with the other lung, then the good lung will make use of this additional air space to compensate for the other side, that is the purpose of it?

A. Sure.

Q. And this right lung, did he seem to be making a full hundred per cent use of that, did that seem to be functioning?

A. Yes, full hundred per cent, all right enough. His respiration was about twenty-five to the minute while he was sitting in a chair and it went double what it ought to have been in a normal [fol. 194] individual. That is, it was a half greater, anyway, than it should have been and his pulse rate, of course, correspondingly elevated. I think it was 84 or 86 that I took it in the office while sitting. I did not take it when he was moving around.

Q. What should it be normally?

A. Well, about seventy.

Q. The fractured ribs, did you observe those?

A. Oh, yes.

Q. And which ones were the most injured?

A. Well, the upper ones that were fractured were the most injured.

Q. Appeared to have received the brunt of the blow?

A. Yes.

Q. Now, this heart, do you call it a displacement?

A. Well, there is a displacement, yes. I really meant displacement of the apex beat.

Q. What do you mean by that?

A. Well, that beat that you can feel with your hand when you put your hand on the heart is the apex beat.

Q. And which is the apex?

A. Well, the lower part of the heart in this case.

Q. That appears to be where?

A. A little outside of the Mammary line.

Q. Do you mean that the heart was simply enlarged on the right side?

A. Well, it is enlarged on the right side and has pushed the left [fol. 195] side over.

Q. Which way?

A. Towards the point of least resistance which is the left side.

Q. Oh, the left side has gone over towards the left?

A. The left side of the heart?

Q. Yes.

A. Yes.

Q. Then you didn't mean at all that the whole heart has gone over towards the right?

A. Yes, so far as I can tell the whole heart has gone over towards the left and there is some enlargement towards the right also, of course, naturally.

Q. Well, I thought it had gone towards the sternum?

A. Well, it did at first.

Q. What caused that?

A. Well, I suppose that when the lung at that time had not shrunk the way it has now and the ribs pressing down and encroaching upon the capacity of the chest, you see, it forced it over, but the lungs have shrunk since that time and the heart has enlarged to take care of the increased resistance which it has and it

has gone towards the side of least resistance which is the shrunken lung.

Q. Oh, towards the left?

A. Yes, sir.

Q. Then you do not mean that his whole heart is displaced over towards the right?

A. Well, you can call it that or not, as you like. I don't know [fol. 196] whether—it has gone over, anyway.

Q. Towards the left?

A. Yes.

Q. And you say there is nothing on this picture E that shows any abnormal condition of the heart there?

A. Why, it shows the enlargement.

Q. Where is that? It don't show any whatever there?

A. Well, very little there below, but you can see there.

Q. Very little. I don't see any at all? Now, normally it should be a little toward the left of this sternum line, shouldn't it?

A. Yes.

Q. But normally it sticks over just a little bit to the right, doesn't it, to the sternum line?

A. Under the sternum, yes.

Q. Doesn't it come over a little bit to the right?

A. No, not in a normal heart.

Q. It is back of the sternum, is it?

A. Yes.

Q. How near to the right edge does it come?

A. Oh, I suppose it is very slightly under there. I don't know that I could give you the measurements of it, but it doesn't go clear across. It probably may be a third of the way across from the left.

Q. Does it vary in different individuals somewhat?

A. Well, I suppose, slightly.

[fol. 197] Q. This sacroiliac joint matter, isn't there a difference in the length of the legs of the same individual? I am talking about the crest of the ilium?

A. Well, I don't know about that. My idea is that nature is one of the most accurate machinists and architects in the world or anything that we ever heard of and I do not believe she makes those mistakes once in a thousand times, of having one larger than the other.

Q. The crest of one ilium a little higher than the other?

A. I don't believe she ever makes that mistake very often.

Q. Nature can be and is very frequently interfered with in her operations?

A. Yes, that is true, too, but that doesn't happen often either.

Q. Isn't it frequently true that a person has one shoulder higher than the other?

A. Well, he might have from occupational or postural position or something like that or from their occupation they may become that way. But it was not that way originally.

Q. Oh, no, not originally, but I mean to get that way; don't we frequently have one arm longer than the other?

A. Well, they are not normal.

Q. And you say that you have found difference in the length of the legs in individuals?

A. Well, abnormally, when the leg has had something wrong with it.

[fol. 198] Q. Well, without anything wrong with it?

A. I don't think I have.

Q. On account of postural conditions?

A. Well, postural, that is only a temporary proposition and can be corrected by getting your patient right on the table.

Q. In that condition you would have to get him right or else the crest of the ilium might be different?

A. That is right, yes.

Q. Do you say, Doctor, that a person cannot by a voluntary movement raise the crest of the ilium on one side by jerking the leg up?

A. No, I don't say that.

Q. You think he could?

A. I think you could do it, but you would have to have a corresponding flexure in the spinal column.

Q. Well, he could do it while lying down flat on his face?

A. Yes, but it would have that corresponding flexure of the spinal column.

Q. But they could jerk that crest of the ilium up by jerking up the muscles of the leg?

A. Yes.

Q. Now, did you find any objective symptoms of this man having a subluxation of the sacroiliac joint?

A. Well, I can't say that I did exactly. Of course, the X-ray picture shows a little lower on the left than it does on the right side. Now, so far, as my manipulation and examination went [fol. 199] I was not able to determine that there was any subluxation of that joint. All I could determine was that there was some trouble there by the fact of manipulating the muscles; twisting and turning and flexing and that sort of thing showed evidence that there was considerable trouble on the left side of the pelvis and I was of the opinion that that was entirely due to some straining of the sacroiliac joint because the maximum tenderness was at that point.

Q. But you would speak of it, then, as a strain of the sacroiliac joint?

A. That is what I should call it, yes. That is bad enough.

Q. A strain of the ligaments, is that what you mean?

A. Well, of the joint structure.

Q. Resulting in a lame back?

A. Yes.

Q. Ordinarily don't people get, by heavy lifting we will say, a strain of the sacroiliac joint?

A. It is a matter of degree. Now, some people can get a slight strain there that will bother them for a long time and then it works from that right up to a maximum strain that one might get there, which is a pretty serious proposition.

Q. Well, that is altogether different from a severance of those ligaments and subluxation or dropping down?

A. Yes, I doubt very much if the ligaments were severed. I doubt very much about that.

[fol. 200] Q. Well, you didn't see anything to indicate that they were, did you, Doctor?

A. I did not, no.

Q. Then you would not call this a subluxation of the sacroiliac joint?

A. No, I would not.

Q. And if a man had a subluxation of the sacroiliac joint of a half an inch, Doctor Webster, could he walk?

A. Well, that is a new one on me. I never saw a subluxation of that much.

Q. You never saw a subluxation of that character?

A. I never saw one that much, no.

Q. What is the biggest one that you ever saw?

A. Well, I never saw one that I could measure.

Q. Couldn't you measure by measuring the crest of the ilium?

A. Well, I don't know.

Q. You never tried that?

A. No.

Q. But a man who had any subluxation, dropping down, looseness of that sacroiliac joint, Dr. Webster, in your best judgment and opinion, could he walk?

A. Well, it would be difficult. He could walk with difficulty.

Q. He would not go hunting, would he?

A. Well, not when it originally happened. Not for a while.

Q. If there was an actual subluxation, a severance of those ligaments, would they heal up, grow together again?

[fol. 201] A. Yes, I think nature would repair that.

Q. Do you know of any instance where those ligaments were severed or cut off?

A. No, I never knew of an instance of it anywhere.

Q. You never encountered it in your personal experience?

A. No, I can imagine where such a thing might happen.

Q. Did you ever know of a man recovering, getting so he would walk, when he had a severance of those ligaments and a subluxation of that joint?

A. Well, it is beyond my experience, a severance of those ligaments.

Q. This pectineus muscle, what muscle is that?

A. It is a muscle that has its origin around the pubes and pubic bone and extends over to the thigh bone.

Q. Its origin is not in the sacroiliac joint?

A. No, but a strain of the sacroiliac joint might very easily strain the pubic joint there and cause trouble from there.

Q. Its point of insertion, what do you mean by that?

A. Why, it is carried across and is blended into the femur.

Q. Do you find any evidence of any injury to the femur here?

A. No.

Q. And the only thing that made you think there was some trouble with that pectineus muscle was this contracting?

[fol. 202] A. Its tenderness and tenderness all over the point of insertion.

Q. That would indicate a strain of it?

A. Yes.

Q. There was an atrophy of the palmer muscles?

A. Yes, sir.

Q. Can that be seen?

A. Quite easily, yes.

Q. Is there any atrophy of any of the muscles of the small finger across the hand?

A. No, they are supplied by a different nerve.

Q. What is it this ulnar nerve supplies?

A. It supplies the muscles. It has a double function, partly sensory and partly motor. And the motor supply of a great many of the muscles on the palm of the hand, in addition to the sensory function there.

Q. Well, there is no atrophy of the whole hand, then, generally?

A. Not the hand as a whole. Those palmer muscles.

Q. Don't you think that with use that situation will improve?

A. I doubt very much if it will after this length of time. The fact that it is just a certain group of muscles that are involved and not the whole muscular system of the hand would indicate that it was due to injury and one can put one's hand away up in the axilla here and feel away back and get a distinct tenderness in the regions of the brachial plexus.

Q. You did with him?

[fol. 203] A. Yes, sir.

Q. That is, he said there was a tenderness there?

A. Well, he said it hurt him. I don't know. He didn't know what I was after and he said it hurt him and I believed it did.

Q. That is, you took his word for it?

A. Yes. Well, not only his word; it wasn't necessary to depend entirely upon his word because I had the effect of the injury to the nerve to indicate that there would be some trouble there.

Dr. E. F. JAMISON, on behalf of plaintiff, duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Q. Dr. Jamison, you live in Brainerd?

A. Yes, sir.

Q. Lived there, I believe, all your life, born there?

A. All but seven or eight years.

Q. What medical college are you a graduate of?

A. I received my first medical education at Tuft's medical college at Boston for four years. Then I received my degree the following year and took the Massachusetts State Board examination and was licensed to practice in that state.

Q. Where did you begin your practice, Doctor?

A. Motley, Minnesota.

Q. How long have you been practicing at Brainerd?

[fol. 204] A. Eight years and a half.

Q. You have a general practice?

A. Medicine and surgery.

Q. Licensed to practice under the laws of this state?

A. Yes, sir.

Q. Did you make an examination of Mr. Gouneau, here in Bemidji recently at my request?

A. Yes.

Q. When was your first examination?

A. I examined him superficially Sunday afternoon and more thoroughly the following day.

Q. And on the following day when you made the examination did you strip him?

A. Yes. He was stripped the first and second time also.

Q. Examination of his left lung, chest, wall, heart?

A. General examination, yes, sir.

Q. And the left leg and arm that we complain of, particularly those?

A. Yes.

Q. Tell what you found the condition of this man's left lung and heart and surroundings, including the ribs?

A. I started with measurement of the chest to determine if there was any difference in one side or the other. I found a difference of just a little trifle more than an inch, the left side of the chest being an inch smaller than the right. And then on palpation I could feel [fol. 205] the callous on the ribs, just to the left side of the spinal column in the back, indicating that injury had taken place there of those ribs. The only ribs that you could feel with the hand on palpation were those below the scapula because the other ribs are up under the scapula and that is the seventh, eighth and ninth the ribs are calloused.

Q. Marked or slight?

A. You can feel it easily enough with the fingers. Then next was auscultation of the left lung and on the front part of the chest on the right side it appeared perfectly normal; that is, the respiratory sounds that you elicit on auscultation were normal throughout the right lung and practically normal in the left lung in front, but as you got around to the back you could hear the respiratory as well as the inspiratory breathing which indicates a solidification of some sort in the chest. In that location of course it would be the lung itself.

Q. About the area of that, what proportion of the left lung, if you can tell us?

A. The surface in the back was about as wide as your hand from the spinal column out towards the left in the back and I should say

about one-third of the lung was damaged. Palpation of the heart you could not feel the apex beat with the patient lying down, didn't seem to be the pound that you should have, but with the patient standing up and bending forward so that the apex of the heart would come against the chest, the apex was from an inch and a half to two inches to the left of the left nipple line, displacement, and with light percussion [fol. 206] you could easily distinguish an enlargement of the heart, especially on the right side. There were no valve leaks and that is about all there was to that.

Q. As you have heard all this testimony of the plaintiff and keeping it in mind and assuming it to be true, any doubt in your mind about the accident being the cause of these conditions you are describing?

A. The fractured ribs there and everything indicates an accident. There is no doubt about it.

Q. And what, in your judgment is now and will be in the future the effect upon the plaintiff and his usefulness as a working man, having reference now to the condition of the ribs and the lungs and the heart?

A. He will have some shortness of breath from the conditions of the lung, but the heart is the important thing here. On account of that alone he will never be able to do manual labor, any heavy work at all, that requires very much exertion.

Q. And you have heard the history of the case and the length of time that has passed since the accident?

A. Yes, sir.

Q. Taking that into consideration, what is your opinion as to the future of the man, as to whether he will improve or not?

A. He certainly won't improve, but in all probability the heart will get worse.

Q. Could you tell us the cause of this enlargement of the heart and the trouble with it?

[fol. 207] A. Yes, that can be easily explained from the lung condition. When you have a partial disability or destruction or injury to the lung so that a certain part of the lung is not working that has as large an area as we have here, why, you get more strain on the left side of the heart, that is, the left ventricle, which is pumping blood to the lung. It is pumping against an abnormal resistance and that causes a back pressure, not a back flow of blood, but a back pressure against the right ventricle and causes gradual dilatation. It is hard to say how much further that will dilate, but it is a slow process and you get a gradual dilatation of the right heart.

Q. Would it be safe, in your judgment, for the plaintiff to engage in anything that would cause heavy lifting or heavy strain?

A. With the condition he has there it is very dangerous.

Q. How about exerting himself by a rapid movement so as to exhaust his breath and stamina?

A. He would exhaust his breath because the heart does not work properly when he exerts himself, as well as a lack of air space in the left lung.

Q. Any remedy for these conditions?

A. None whatever.

Q. Would those conditions cause pain, in your judgment, in the heart and lungs in connection I mean with any exertion, outside of just the ordinary exertion of walking along reasonably?

A. Not particularly. Some of those cases you get a dull pain in [fol. 208] the heart from a stretching of the muscle. No particular pain otherwise.

Q. How about the left hand?

A. Upon examining the left arm and left hand, it was smaller. I did not measure the left arm. I could see with the naked eye the difference in size, that it was smaller than the right one, particularly the muscles on the front of the hand supplied by the ulnar nerve, while the muscles on the back of the arm supplied by the musculospiral nerve are not atrophied to the same extent. There is some atrophy from disuse because he has not used the hand very much. There is atrophy from disuse, but in ratio those muscles supplied by the ulnar nerve are atrophied more than the muscles that are not supplied by it.

Q. That means what to you?

A. It means injury to the ulnar nerve. It is hard to tell at just what point the ulnar nerve is abnormal.

Q. Could you give us some definite idea as to the left arm now as compared to the right arm and hand, its usefulness?

A. He can use it to a certain extent. He would not do any heavy lifting or heavy work with it. He could not rely on it to hold himself up or in the line of work that he was doing he couldn't use it to any advantage that way, although he has some use of it all right.

Q. What is the prospect about the hand in the future?

A. A nerve injury is practically always permanent.

[fol. 209] Q. Does that mean there will or will not be improvement in the hand's usefulness?

A. No improvement. The reason I believe that is because it has been sometime since the hand was injured and there has not been any improvement and there should be in this time if there ever was going to be any.

Q. Take the iliac joint and those regions, tell us what you find there?

A. The symptoms undoubtedly lead to the diagnosis of a subluxation of the sacroiliac synchondrosis. In making a diagnosis of a case of that kind it is sometimes difficult and you have to take the history of the case as well as the physical examination, so I asked him about the conditions as soon as he was able to determine it himself. He said as far as he knew there was ecchymosis around the hip, which is black and blue; that is, showing blood into the tissues and changes the color of the tissues. You always get that in dislocation of fracture. I do not believe you ever have a fracture, and this dislocation is very similar to a fracture because it is fairly well united, the bones are, without you get ecchymosis, which he had according to his statement. And then the leg was smaller, probably smaller than normal. There was quite a difference

with the naked eye between the left leg and the right. That probably is due greatly to disuse more than it is to real atrophy, atrophy from disuse there on account of not using the leg on account of the pain in this sacroiliac joint. On pressing the finger at the junction [fol. 210] between the ilia and the sacrum at a time when the patient didn't know it was going to be done, he flinched quite suddenly and complained of pain in that region, while in using deep palpation and quite considerable pressure around other points in that region he did not complain of any pain except that the sciatic nerve was a little tender if you pressed real hard on it. You could not feel any movement in moving the leg and placing your hand on that joint because that very seldom occurs in those cases. I do not believe there is a case once out of ten thousand where you can feel the motion in that loose joint. It requires straining and the weight of the body and so forth in order to do that and that when you get the motion it produces the pain in the joint, not from manipulation so much, except from pressure.

Q. What is your opinion as to his suffering now from an injury known as sacroiliac joint injury?

A. The symptoms point only to that injury, that he has a sacroiliac subluxation right now.

Q. Is that a condition that will improve in the future, taking into consideration the history of the case and the length of time that has passed?

A. The history of those cases is that they do not improve. You can treat them with some relief, but when the treatment stops the condition is still there.

Q. Well, is the condition you found the joint in one that is slightly disabling or to what extent, in your judgment?

[fol. 211] A. Well, he can get along ordinarily with his walking from place to place, but he won't be able to do any manual labor or very much work on account of that condition.

#### Cross-examination.

By Mr. Palmer:

Q. An X-ray picture would be the best means of disclosing whether there was a displacement of those bones?

A. It might show a displacement and it might not, but here we have a subluxation, not a dislocation.

Q. What do you mean by a subluxation?

A. Loose joint.

Q. A slipping by?

A. No, a loose joint capable of slipping.

Q. Then there would be a slipping by, would there?

A. Sometimes there would and sometimes there would not. The joint is loose. Sometimes it is in position and sometimes it is not.

Q. There would not be any dropping down then?

A. Not necessarily. It depends on when you take the picture and the position of the patient and so on. Most of the sacroiliac injuries, subluxation, is very slight. A sixteenth of an inch sub-

luxation is as bad as far as pain is concerned as a quarter of an inch would be.

Q. Did you ever see a patient with a subluxation of one-fourth of an inch?

A. Not the exact amount of subluxation. You only know there is subluxation there.

[fol. 212] Q. Did you ever see a patient with a subluxation of the sacroiliac joint of a sixteenth of an inch?

A. It can't be measured as accurately as that, so I can't answer the question.

Q. Did you ever make a diagnosis of a patient with a subluxation of the sacroiliac joint of a sixteenth of an inch?

A. We do not make a diagnosis as to the amount. We make a diagnosis as to subluxation, that is all.

Q. I suppose you include in your diagnosis some estimate of the extent of the subluxation, do you not?

A. At times when you have a loose joint one day the subluxation or the displacement might be a sixteenth of an inch and the next day might be a quarter, depending on the kind of work that a person is trying to do, that is all.

Q. And the next day it might not be any whatever?

A. Yes, sir.

Q. Might be back in its proper place?

A. Yes, it won't stay there because when you have a loose joint it moves around with motion.

Q. Did you move this joint around any in this man?

A. Apparently because he complained of pain.

Q. Could you feel any movement of anything there?

A. No sir.

Q. Then all you went by in diagnosing this as a subluxation was his complaint of pain?

[fol. 213] A. All the symptoms are of that disease; they don't point to anything else.

Q. Well, I say the symptoms are what he stated about it?

A. And my examination, yes, sir.

Q. What did your examination disclose that you could feel, actually feel there, or see?

A. The location of the tenderness there. You rely upon the patient's statement, but in making an examination of this kind of course, you often press when the patient is not aware of it, just to make sure of your diagnosis, and I came to the conclusion that that is what it was. The symptoms point to that. It doesn't point to rheumatism or some other condition; points to that alone.

Q. As to the tenderness and pain you took his word for that, you took his statement? You didn't see any redness?

A. Well, there would not be now.

Q. Nor you didn't see any bruise?

A. No, sir.

Q. Nor you didn't feel any movement?

A. No, sir.

Q. Nor you didn't hear any crepitation?

A. No, you would not.

Q. And the symptoms that you found and from which you diagnosed this subluxation was simply that when you pressed in there where those two bones come together, the sacrum and the ilium, he complained of pain there?

A. That and the flexing of the leg. He complained of pain and then the natural attitude that the patient takes in all cases of sacro-[fol. 214] iliac subluxation. You get a partial flexation of the joint in order to ease the pain. Now, I take it that the patient did not know anything about that, but that is the position that he takes and you cannot diagnose any other condition; it must be that.

Q. You took hold of his leg and moved it about?

A. Yes, sir.

Q. And you judged from the way that he seemed to resist that there was—

A. He did not resist; the muscles resisted. They are on a tension due to irritation in that region. Some muscles were on tension when you palpate the muscle. These are not subject symptoms, they are objective. Some of the muscles are on tension when you palpate them; others are not.

Q. How about those ligaments that hold the joint together, was there anything wrong with those?

A. Yes, sir.

Q. What is it?

A. They are stretched.

Q. Did you measure them?

A. You can't measure them, no, sir.

Q. Did you feel them with your fingers?

A. You can to a certain extent.

Q. I asked you if you did?

A. Yes, I did.

Q. Did you feel any stretching when you felt of them?

A. You cannot feel stretching. From what I found I determined that they were stretched; that is all I can say.

[fol. 215] Q. What did you find by which you determined that they were stretched?

A. The distance between the skin and the sacroiliac joint does not seem as thick as it does on the other side. There is a thinness which indicates stretching.

Q. There was a little depression there?

A. Not a depression, a flatness.

Q. Well, a sort of a thinning of that cushion?

A. Of the tissues over that part.

Q. Well, if there was less thickness of those tissues in there that would make a depression, wouldn't it?

A. It could not without being a depression in the bone. There is no depression in the bone here.

Q. There is a depression in the flesh?

A. No, sir.

Q. There was none?

A. No, sir.

Q. If there was no depression in the flesh there beyond the nor-

mal, how did you determine that there was any loosening of the tissues between those ligaments and the skin?

A. That comes from practice, simply feeling. You can feel that there is a thinner layer there than on the other side; a thinner layer, not a depression, but that feeling of thinness, that the ligaments are not as thick as they are on the other side. Simply a comparison, that is all.

Q. That is what led you to think that perhaps those ligaments were stretched?

A. That is one of the reasons, yes.

[fol. 216] Q. The ligaments were not severed?

A. Some of the fibers probably were. That you cannot state positively.

Q. You could not feel any depression there showing a separation of those ligaments, could you?

A. The ligaments are stretched and not separated. Some of the fibers are probably separated, due to the stretching, but they are fine and you cannot feel them. That always takes place in that condition.

Q. Now, if those ligaments were merely stretched and not separated, they would still hold those bones together, would they not?

A. To a certain extent, yes, sir.

Q. Those are powerful ligaments?

A. Fairly so, moderately powerful.

Q. And there are a number of them?

A. There are a number of fibers, really the anterior and posterior ligament.

Q. They are interlaced and concurse, aren't they?

A. Yes.

Q. Forming an extremely strong binding together of those bones?

A. Strong enough for ordinary use, yes, sir.

Q. Well, strong enough to sustain a great shock?

A. No, sir.

Q. People frequently put a great deal of strain, don't they, upon that part of their anatomy?

A. They put as much strain as it is built for, yes, sir.

Q. And they fall on that part of their anatomy?

[fol. 217] A. Surely.

Q. And nature has designed that whole joint there as a sort of a shock absorber, you might call it?

A. Just the same as other joints as far as that is concerned.

Q. Then a subluxation does not mean a dropping down of the ilium on one side?

A. No, sir.

Q. And the fact that there was a difference of about an eleventh of an inch in the height of the two iliac bones, the crest of them, would not to your mind have any signification?

A. Not necessarily.

Q. If you could take this X-ray picture, and the testimony shows that the man was lying flat on his face and straight on the table,

if you could take that and find a difference of an eleventh of an inch between the two crests of the ilium or ilia, you would not think that that had any signification whatever?

A. That would be impossible to tell with that alone whether it had any significance or not.

Q. In your best judgment and opinion, would it show whether there was a subluxation of the sacroiliac joint?

A. It would show a dislocation, but not subluxation. Subluxation is a looseness. It doesn't show looseness.

Q. And in your judgment, this, if it is anything, is a subluxation or looseness?

A. Surely.

Q. And not a dislocation?

[fol. 218] A. A subluxated joint is loose and dislocates itself at various distances. Sometimes it is in normal position and sometimes it is not.

Q. Then, to your mind, this difference in the crests of the two ilia would not signify anything?

A. I cannot tell anything by that picture at all.

Q. Now, your idea would be if the man was lying flat on his face on the table, holding his back bone straight, that the crest of the ilia would be level anyhow, subluxation or no subluxation?

A. Surely would be level in subluxation.

Q. Yes, and if there was a difference between the two that would probably be a normal condition, where they actually belonged?

A. Depends on how the patient is lying, whether the joint is in place or out of place.

Q. Well, I am assuming that he is lying perfectly prone on his face, lined up on the table for an X-ray?

A. If the muscles are on tension it might have a tendency to pull it out of line, even if the patient was lying straight.

Q. You do not agree with Dr. Drechsler that the patient could not pull the crest of the ilia up?

A. No, I don't agree with him there.

Q. You do not agree with him at all?

A. No, sir.

Q. You think he could pull it up half an inch?

A. Yes, more than that.

Q. More than that. Whether he was standing up or lying down?

A. I believe I could do it.

[fol. 219] Q. If there was a looseness in the sacroiliac syndesmosis, as you call it, coming together of those bones on the left hand side, I suppose there would be some little degree of separation there, would there not?

A. No, there would not be any.

Q. This sacrum is composed of five sacral vertebrae, isn't it?

A. United together as one bone.

Q. Each of them have a little lateral process out on each side?

A. Yes, sir.

Q. And when they fit up against the ilium there is some little depression there or notch to accommodate them, is there not?

A. There is what is known as a facet that the ilia sets on their surface to receive it.

Q. Yes, and if those little horns or knobs were out of place down or up, they would create some little separation there between the two bones, would they not?

A. Oh, theoretically I suppose they would, but you would not be able to see it with the X-ray.

Q. How does the space between bones on an X-ray show up?

A. As a space, unless there is something behind it.

Q. And if there is any space there it shows, doesn't it?

A. It shows except in this location. That is one of the most difficult places in the body to get a good picture. That is the reason [fol. 220] I can't tell anything by that one. That doesn't help me in diagnosis there.

Q. At any rate, Doctor, there is nothing about that picture there that shows any subluxation of the sacroiliac joint?

A. No, sir.

Q. Have you treated patients who had an actual subluxation of the sacroiliac joint?

A. I have seen treated five or six of them in the Boston City Hospital.

Q. In the Boston City Hospital?

A. In private practice I haven't had a case of my own.

Q. These cases you saw in the City Hospital at Boston were not your cases?

A. I treated them myself as though they were my cases.

Q. Were there X-rays taken of them?

A. Where there was doubt as to diagnosis, to see if there was some other condition there causing the trouble.

Q. Was that for the purpose of determining whether there was a subluxation or not?

A. No, it was for the purpose of eliminating some other condition so that we could make a diagnosis of subluxation if it existed.

Q. Then, to make a diagnosis of subluxation you start in and eliminate everything else and when you do that you say subluxation, is that it?

A. Surely; there is nothing else left; must be.

Q. As a matter of fact, Doctor, this subluxation of the sacroiliac [fol. 221] joint is one of the most difficult and baffling things that is encountered in medical science, isn't it?

A. No, sir.

Q. Well, you reach it by a process of elimination?

A. Yes, and feel just as positive as I do of any other diagnosis, simply because you have eliminated everything else and you have the symptoms.

Q. That is the way you get it?

A. Yes, sir.

Q. There is no other way of coming to that conclusion?

A. There is only one way and that is the right way.

Q. Isn't it true that with a sacroiliac injury a man says he has got it and there is not any doctor or set of doctors on the face of the

earth that can say that he hasn't got it or determine that he hasn't got it?

A. I don't think there is anyone can say that he hasn't got it, because if he didn't have he would not be lame the way he is.

Q. Exactly. But if he goes lame, then you say he has it?

A. If he hasn't anything else and the trouble is around that joint and you do not see anything else wrong and you take the symptoms and examine the patient for what symptoms you would expect to get, why, that is the diagnosis you make.

Q. Then you say he has got a sacroiliac injury?

A. Surely.

[fol. 222] Q. And then nobody can prove that he hasn't got it?

A. Why, I shouldn't think so, unless they ignore all symptoms entirely.

Q. You could not take an X-ray picture of his sacroiliac joint and determine that he didn't have it, could you?

A. Couldn't determine either way exactly. The picture is useless there.

Q. Any picture on earth?

A. That is what I am speaking of. I have never seen a satisfactory picture of the sacroiliac joint.

Q. Then I say if a man said that he had a sacroiliac joint injury, you could not take an X-ray picture and determine from that that he did not have it?

A. No, not necessarily.

Q. Nor you could not take and feel around there with your fingers and determine that he did not have it?

A. Well, you cannot determine anything with only one symptom. You have got to take the history as a whole and then come to your conclusion.

Q. You could not by this process of palpation determine that he did not have it?

A. Not with that one thing alone.

Q. And you could not by your auscultation determine that he did not have it, could you?

A. You are not looking for something he hasn't got. It seems a peculiar way of putting it.

Q. I am going to try your process, Doctor, of elimination?

[fol. 223] A. Well, you are eliminating something all the time.

Q. Could you by palpation, feeling around there, determine that he did not have a sacroiliac subluxation?

A. Well, you could determine it if you had a history of a case that a patient was not complaining of anything you could determine that he didn't have it, surely.

Q. Lay aside his complaints, lay aside all his history, could you by examining him—

A. I don't think anyone would try to, in the first place.

Q. —come to the conclusion that he did not have a sacroiliac injury?

The Court: You mean from that alone?

Mr. Palmer: Yes, sir, from that alone.

A. No, you could not.

Q. Could you by your listening, determine that he did not have a sacroiliac injury?

A. I don't use that method at all for that.

Q. If you were going to examine a man to determine whether he was normal when he said he was abnormal at his sacroiliac joint, can you think of any other way that you could discover whether he was abnormal at his joint?

Mr. Anderson: Any other way than what?

Q. Than what I have talked about, auscultation, palpation, X-ray pictures, percussion if you want to, all of those methods?

A. Why, if there is nothing to show that he has got it, he hasn't [fol. 224] got it, that is all. I don't believe you have got it.

Q. If I got up and humped over and walked around and limped on one leg and said I have got it, how are you going to determine that I haven't got it?

A. I would examine for the thinnest point of the joint to see if the ligaments had been stretched. In that condition you would also get some involvement of the sciatic nerve or atrophy of certain muscles supplied by that nerve which would help to determine whether you have it or not. That is part of it, but when you have got it you have got other symptoms too that you would put in with it and make the diagnosis. I could determine, I think, that way whether you had it or not.

Q. Largely a process of elimination?

A. Part of it, yes.

Q. Which way do I understand you to say that heart is displaced, in your judgment?

A. The right side of the heart is enlarged and pushing the apex to the left so that the apex of the heart, the lower part of it, is displaced to the left.

Q. You think rather more of this heart lies on the left side than normal?

A. No, sir, I do not. The heart is enlarged. As far as the location of the heart is concerned for its size it is all right, but it puts the apex out of normal limits. It is displaced to the left too much.

Q. There is no valve trouble there at all?

A. No, sir, I didn't find any.

Q. And the reason for this enlargement of the right heart is due [fol. 225] to additional work in pumping blood into the left lung, is that it?

A. The resistance that it has to work against.

Q. What resistance does it have to work against?

A. It has the part of the left lung, that is destroyed and that was full of blood vessels and there was more area for the blood to go through, but now that area has been excluded and it has to pump through the lung through a smaller space and that increases the resistance.

Q. Well, about a third of it is destroyed?

A. I should judge about a third.

Q. The blood is not pumped into the lung?

A. Sure, it is pumped into the lungs?

Q. Well, into the blood vessels?

A. It goes in. The air cells are divided by partitions. These little capillary blood vessels are in the partitions to nourish the tissue. Those partitions are made of tissue and they have a blood supply.

Q. Do you mean to say that this scar tissue that has formed there does not have any blood passing through it?

A. No, sir, it does not. Scar tissue does not have any blood passage to the extent that lung tissue has. The lung has a very, very good blood supply and the scar tissue has practically none.

Q. Suppose one cuts a gash in his leg here and that heals, what kind of tissue is there in there?

A. That is fibrous tissue, scar tissue.

[fol. 226] Q. That scar tissue is good, healthy tissue, isn't it?

A. Yes, it is like cartilage or—I mean comparatively.

Q. It is not like cartilage?

A. As far as health is concerned, it is healthy tissue in the way it is made up. It is healing tissue, scar tissue.

Q. It is not dead?

A. No, it is not dead.

Q. It has blood in it?

A. Not necessarily.

Q. But scar tissue has some blood supply?

A. Practically none.

Q. If it had no blood supply it would be dead, wouldn't it, Doctor?

A. It is like your finger nail; has no blood supply but you don't say it is dead because it is associated as a part of the body; has no blood vessels running through it and that is the same as scar tissue.

If I cut the muscle of my arm, very substantially, doesn't it heal up?

A. Surely.

Q. Doesn't that tissue come together again?

A. Yes. The space would be filled in with scar tissue and that part of it would not act as muscle. It would be dead as far as function is concerned.

Q. But it would be alive so far as nourishment is concerned?

A. Like finger nails.

[fol. 227] Q. But that substance would not be like my finger nails?

A. It is fibrous tissue.

Q. Fibrous tissue, but what is your finger nail?

A. A tendon has no blood supply; that is alive.

Q. It has some blood supply?

A. You need blood supply to form scar tissue, but after the scar tissue is formed then it has no more blood supply.

Q. And you think this is scar tissue in the lung?

A. Has no blood supply.

Q. Not having this blood supply is what makes the heart enlarged, is that it?

A. It is the lack of lung space, the lung has been destroyed. The scar tissue has nothing to do with it. There is not as much lung as there was before and it puts more resistance on the heart. That is what I have in mind.

Q. Supposing a man had a large scar on his leg, large patch of scar tissue, is that going to enlarge his heart?

A. That is a systematic circulation. Here in the lung the right heart takes care of the pulmonary circulation, has nothing to do with the rest of the body, except in a very indirect, round about, way, you see.

Q. All right, it pumps the blood into the lung, does it?

A. Yes, sir.

Q. Through the arteries; then it goes out through the veins, is that it?

A. Through the pulmonary artery to the lungs, yes sir.

[fol. 228] Q. And the front part of this lung functions all right?

A. Fairly good shape.

Q. It is only this part in the rear that was damaged by this blow and the fractured ribs that has this scar tissue there?

A. Posterior one third of the lung.

Q. This ulnar nerve, is that cut off?

A. If it was he couldn't use his hand at all; that is, that part of it supplied by the nerve.

Q. Then the fact he can use his hand shows it is not cut off?

A. Yes, sir.

Q. It is bruised?

A. It has been bruised.

Q. Isn't a nerve like any other part of the body, if you bruise it it will heal?

A. No, sir. A nerve is the slowest tissue to heal that we know of.

Q. But it will heal, will it not?

A. Most of the time it won't heal at all. If you cut a nerve in two you cannot put the ends together and get good results.

Q. That is why I asked you whether this was cut in two or not; you said it was not?

A. Oh, sometimes when it is bruised. When it is once hurt it is always hurt and it doesn't heal.

Q. This ulnar nerve is what we call the crazy bone?

A. Yes, sir.

[fol. 229] Q. And if I whack my elbow against the table here and hurt my crazy bone and set it roaring, that means I have whacked that ulnar nerve?

A. That is what it does.

Q. And if once bruised, always bruised?

A. You have stimulated the nerve. You do not necessarily bruise it.

Q. Suppose I hit it hard enough to bruise it?

A. It would stay there, then, that is all.

Q. It would never get well?

A. Not if you hit it hard enough to destroy some of nerve fibers; they are gone, that is all. It is a matter of destruction.

Q. You have assumed that some of the nerve fibers are destroyed, is that it?

A. Yes, sir.

Q. And you assume that from the fact that it is not healed up yet, that is the idea, isn't it?

A. Yes, the symptoms are still there and they are definite symptoms.

Q. You go by the symptoms?

A. That is all we have got to go by, yes, sir.

Plaintiff rests.

Dr. FRANK C. SARAZIN, on behalf of defendant, duly sworn, testified as follows:

Direct examination.

By Mr. Palmer:

Q. Your full name?

A. Frank C. Sarazin.

Q. Where do you live?

A. Superior, Wisconsin.

[fol. 230] Q. How old are you?

A. About fifty-six.

Q. What is your business?

A. Physician and surgeon.

Q. In this state or in the state of Wisconsin?

A. In the state of Wisconsin.

Q. How long have you been a physician and surgeon in the state of Wisconsin?

A. Thirty-three years.

Q. Where have you practiced during that time?

A. Superior.

Q. Will you say something briefly of your qualifications?

A. The Northwestern Medical School which is a branch of the Northwestern University Medical School at Chicago and other such as post-graduate work and so on, and of course in my preliminary work I took at Ann Arbor, Michigan, in medicine as well.

Q. What line of practice have you specialized in, if any, Doctor?

A. General practice of medicine and surgery.

Q. Are you connected with some hospital at Superior?

A. Not specially, not any further than for the care of my own individual work.

Q. What hospital do you use?

A. St. Mary's Hospital is one of the principal hospitals there.

Q. Have you some connection with the defendant railroad company, the Soo Line?

A. I do some work for them in Superior.

[fol. 231] Q. And how long have you been doing work for the Soo Line in Superior?

A. Ever since they have entered Superior. I think that must be ten or eleven years ago, twelve possibly.

Q. Do you do work for some other railroad companies there, Dr. Sarazin?

A. Yes, sir.

Q. Which ones?

A. Great Northern, the Northern Pacific, South Shore & Atlantic and the Northwestern Railroad and the terminals.

Q. And that work that you do for them is what?

A. Principally their emergency work. I attend to the employees who are injured in the course of their duty.

Q. And does that give you quite an extensive practice?

A. Yes, sir.

Q. You have outside practice besides that?

A. Yes, sir.

Q. What will you say of your practice in Superior as to whether it has been extensive or not?

A. At times.

Q. And what part of it has been occupied with surgery?

A. Late years more so than formerly.

Q. Do you know the plaintiff here?

A. Yes, sir.

Q. How long have you known him?

A. Since October 27th, 1920, I think.

Q. That was the date of his injury?

[fol. 232] A. Yes, sir.

Q. You had not been acquainted with him before?

A. No.

Q. When was your attention first called to this accident, Dr. Sarazin?

A. Sometime during the early evening of that same day, 1920, October 27th.

Q. And when was your attention called to it?

A. I think I received a message over the telephone from the dispatcher's office, of the Soo who is located in Superior, that there was an injured man coming in and to wait for him at a certain place.

Q. Where did you first see him?

A. I met him on Belknap street where the Soo Railroad crosses.

Q. They made a stop there, did they?

A. Yes, sir.

Q. Did some other doctor come with him?

A. There was a doctor from Iron River who come in with him.

Q. Do you remember the name?

A. I cannot.

Q. Doctor Blythen?

A. Yes, sir, that is the name.

Q. Was he from Iron River or Gordon?

A. Gordon.

Q. You understood it was the place where the accident occurred?

A. Yes, at Gordon.

[fol. 233] Q. Had he given the injured man some aid, first aid?

A. Yes, he did what he could for him. I don't think that he did very much for him, but he was with him.

Q. Did you meet him with the ambulance?

A. Yes, sir.

Q. And did Dr. Blythen go with you then?

A. I think he rode to the hospital in the ambulance with the patient, although I am not positive, but that is my impression.

Q. And what hospital did you take him to?

A. St. Mary's Hospital.

Q. What was done there, Doctor, tell us?

A. He was examined and got him dressed with night clothes, put to bed and an opiate administered to relieve the pain.

Q. Was he in a room of his own at that time?

A. Not that particular night.

Q. Was he afterwards?

A. Yes, sir.

Q. When?

A. I think the next day.

Q. Did you make any examination of him at that time?

A. Yes, sir.

Q. Will you tell us what examination you made?

A. I examined his entire body and particularly his left chest which was injured more than any other part of his body.

Q. Did you strip him?

A. Yes, sir.

[fol. 234] Q. At that time will you state what bruises or contusions or evidence of injury you found, Doctor?

Q. Well, there was some evidence of bruises of the left chest, particularly towards the back, slight bruises, slight abrasions, rather, and outside of that I couldn't see much of anything that night.

Q. Where were these abrasions?

A. On the back near the edge of the chest; I would say between the spine and the arm pit; that is, along that line, if the line were drawn from the arm pit down.

Q. Were these abrasions pronounced?

A. No, sir.

Q. Did you see any evidence of any bruising there at that place?

A. Not so much that night.

Q. Did you determine whether there were any ribs broken that night?

A. Yes, sir, it was evident enough that the ribs were broken; just could feel them.

Q. Could you tell how many?

A. No, not that night.

Q. Now, Doctor, did you find any other evidences of injury on him?

A. There was no evidence of injury especially, but he complained of his left arm.

Q. Did you find any bruise?

A. No.

Q. Abrasions?

A. I don't believe there was any abrasions of the arm; none as I can remember.

[fol. 235] Q. Now, you know where the sacroiliac joint is?

A. Yes, sir.

Q. Did you look at that part of the body?

A. I looked at that part as well as every other part.

Q. Were there any bruises or abrasions there?

A. I didn't see any.

Q. Any black and blue spots or anything of that sort there?

A. Well, I didn't notice any there that night.

Q. Well, I will ask you generally, did you afterwards notice any there?

A. Afterwards there were some scattered bruises along the side and back and, in fact, on different parts of his body. Nothing very pronounced except in the region of the chest injury.

Q. Was there any pronounced bruising or contusion or ecchymosis or anything of that kind around his sacroiliac joint?

A. No, sir.

Q. Ever at any time?

A. Not that I have ever observed.

Q. As to pain or trouble in his sacroiliac joint, in that region, tell us about that that night and subsequently?

A. I don't remember that there was any pain especially or my attention was in any way called to that particular region.

Q. How long did he remain at the hospital?

A. Close on to two months, I think. I think he left there on the 21st of December the same year.

[fol. 236] Q. Going on from that first night, when next did you see him?

A. The next day.

Q. About what time?

A. I couldn't say positively, but usually I see my patients early in the morning, so I presume I saw him at that time.

Q. Did you make a more full examination of him at that time?

A. Yes, sir.

Q. What did you find?

A. The same condition that I have described.

Q. Did you take any X-rays of him?

A. Yes, sir.

Q. When were those taken?

A. Sometime during the same day, I believe.

Q. And what did the X-rays disclose, Doctor?

A. The X-rays disclosed an extensive injury of the left chest causing a fracture of several of the ribs, 5th, 6th, 7th, 8th, 9th and I believe some slight injury to the tenth rib.

Q. This X-ray plate, Defendant's Exhibit 12, is this the X-ray that was taken at the time you mention, the day after the injury?

A. Yes, sir.

Q. And was taken under your direction, I suppose?

A. Yes, sir.

Q. Will you show the jury these fractured ribs as shown by that plate?

A. Yes, sir, the 5th, 6th, 7th, 8th, 9th and possibly the 10th [fol. 237] (witness indicating on Defendant's Exhibit 12).

Q. Can you tell very well from that whether the 10th was injured?

A. Not very well. From this picture I don't believe I would even suspect an injury.

Q. And which ones show the greatest fracture?

A. Why, I believe that the 6th and the 7th show the most displacement; the 6th rib especially.

Q. And do they show some overlapping there?

A. Yes, sir.

Q. Something has been said here about there being fragments or pieces or splinters of bone at the end of those fractures; state whether those are observable upon this X-ray?

A. I do not see any splinters there. The ends of the fractured bones are observable.

Q. Are there any fragments?

A. No. I do not observe any fragments.

Q. Did you find any condition which indicated there were fragments or splinters on the ends of the bones?

A. No.

Q. Now, as to the lung tissue itself can you from this X-ray plate observe any injury to that?

A. I don't believe you could tell very specifically from the plate itself.

Q. Did you find or observe evidences of any injury to the lung tissue itself?

A. Yes, there must have been some injury to the lung tissue. I believe.

Q. How extensive?

A. I do not believe it was very extensive.

[fol. 238] Q. Why do you say that?

A. Because there was no great amount of disturbance of the lung at the time of the injury and following the injury.

Q. Was there any hemorrhage, any blood from the lung?

A. There was some blood coughed up.

Q. How soon after the injury or what time?

A. I presume it occurred, some of it, right away afterwards and continued in lesser amount for a couple of weeks, sputum colored with blood.

Q. And, in your judgment, where did this blood come from?

A. Came from some part of the lung, some of it, and some from probably higher up, maybe some from his throat, nose and head, but I am positive there was some from the lung as well.

Q. What treatment was given in general?

A. The primary treatment was to put straps on the chest so as to reduce the action or the work of that part of the chest. Those are adhesive straps that are put on the sides of the body, the same as you would put clapboards on the side of a house, just one layer overlap-

ping the other a little bit and drawn quite tense so as to reduce the friction of the bones between the ends of the bone on account of the breathing that necessarily takes place.

Q. When were these adhesive straps put on?

A. I put some on the first night, I believe.

Q. And more subsequently?

A. Yes, sir.

Q. How long did those remain on?

[fol. 239] A. I don't remember. Usually left on a couple weeks.

Q. I call your attention to this X-ray plate, Plaintiff's Exhibit B, which is said to have been taken in January, 1921; tell us the difference between the ends of the ribs as shown on that X-ray and on Defendant's Exhibit 12; first, what is the difference as to the ends of the fractured bones, fractured ribs?

A. Well, one marked difference is that the overlapping is not as great in this picture of more recent date. Especially in the second, and the ribs are cemented more closely together than they are in this picture. Outside of that I do not see any difference specially.

Q. How do you account for the less over-lapping in Exhibit B?

A. I suppose that the internal force or pressure in the lungs forced the bone into position to some extent.

Q. There is no way of setting the fractured ribs, bringing the ends of the two pieces into apposition, is there?

A. There would be no practical way.

Q. The only way to do is to let the natural expansion of the air coming into the lung kind of pull the bones back into apposition as well as they will?

A. Yes, sir.

Q. These did come around somewhat into apposition, did they? [fol. 240] A. They show a considerable difference in the two pictures.

Q. About how much over-lapping would you say is shown by this Exhibit B on the 5th, 6th and 7th ribs?

A. There was three-quarters of an inch in the 6th, maybe a little less than that. I think there is less than that; about three-quarters of an inch in the 7th and about the same in the 8th and very little in the 9th.

Q. And none in the 10th?

A. None in the 10th according to that more recent picture.

Q. Does this picture taken in January, 1921, show a union or not of those bones?

A. There appears to be some deposit of bone. It is not very plain, but it exists there just the same.

Q. And you have examined the plaintiff since?

A. Yes, sir.

Q. You examined him I think it was September 10th, 1921?

A. Yes, sir.

Q. In Minneapolis. What did you find then with reference to the union of these ribs?

A. They were united at that time.

Q. What sort of union was there?

A. A firm union, osseous union.

Q. Was there any impinging or pinching of the tissues between the ends of those bones?

A. I don't believe that there was. It would have interfered with union had there been any interposing substances to prevent the surfaces from coming together.

[fol. 241] Q. And on the picture which you took immediately after the accident here, is there any driving in of the ends of those ribs into the lung tissue?

A. Well, I cannot see any evidence of anything of that kind in the picture, although it might exist and still not be easily determined in an X-ray picture.

Q. Before the healing process could take place, state whether or not that tissue would have to be out of that?

A. There was no evidence at any time, either by X-ray or any other way, of their having been any impinging of the fractured bones of the lung.

Q. The two months that the plaintiff was there at the St. Mary's hospital, I will ask you if any complainant was made by him of pain or trouble in his sacroiliac joint?

A. Not enough to call my attention to it or to require any serious consideration. He may have made some complaint. I would not say positively that he did not.

Q. But making any to you?

A. I don't remember.

Q. At any rate, was your attention called to it in such manner that you gave it any treatment or any attention?

A. No, sir.

Q. Doctor, had there been at the time of this injury a subluxation of this sacroiliac joint, would it have caused the patient pain?

A. Yes, sir.

Q. And what degree of pain?

[fol. 242] A. Well, the pain itself with the subluxation, of course, would be very severe, but the accompanying injuries that would necessarily follow an injury so severe as to cause a subluxation there would be manifest in more ways than one.

Q. What different ways?

A. Well, it is usually the result of a crushing injury, very severe injury ordinarily to cause a subluxation of a joint of that kind in a healthy man.

Q. Would you have found external evidence of it?

A. I would expect to.

Q. What evidences?

A. Oh, there would have been fractures of the different bones of the pelvis, probably ruptured bladder, ruptured urethra, internal urethra, hemorrhage from the bladder, different things of that kind. It is usually the result of a crushing injury.

Q. And as to pain subsequent to the injury, what degree of pain would he have in that region?

A. I think there would have been a great deal of pain.

Q. Would there have been pain to the extent that he would have complained of, in your judgment?

A. Yes, sir.

Q. And complained frequently?

A. Yes, sir.

Q. How soon did he get up and move about, be able to get about on his feet?

[fol. 243] A. I think I saw him in the corridor of the hospital on the 24th of November, but he had been up previous to that, with assistance, I presume, and was taken to the bath room, given a tub bath.

Q. When you saw him on the 24th of November, you say in the corridor, was he walking?

A. Yes, sir.

Q. Without assistance?

A. Yes, sir.

Q. Without a cane or crutch?

A. Yes, sir.

Q. And what distance did he walk or about what distance?

A. I would not know positively; to cross the corridor, however, a distance of fifteen feet.

Q. Now, Doctor, had he had at that time a subluxation of the sacroiliac joint, in your opinion, could he have walked at that time?

A. I don't believe that he could if he had had a severe injury to the sacroiliac joint.

Q. Take a severe strain of the sacroiliac joint, without an actual subluxation, could he have walked?

A. Well, that might be different. He might be able to walk in that case, but it would be very painful.

Q. Did he give the appearance of having pain in that region when he walked?

A. No.

Q. And had he had any severe strain of the sacroiliac joint would it have caused him pain?

A. I believe so.

[fol. 244] Q. From the start to such an extent that he would have complained of it?

A. I think so.

Q. And asked for treatment?

A. Yes, sir.

Q. What, if anything, did you observe as to any injury to his left leg?

A. I did not at any time observe any injury to his leg.

Q. Was there any complaint by him as to injury to his left leg?

A. Not that I can recollect.

Q. At any time while he was there?

A. No, sir.

Q. At any rate, did you give any treatment for any trouble with his left leg?

A. No, sir.

Q. Now, particularly the sciatic nerve of his left leg, did you have any occasion to notice whether there was anything wrong with that?

A. I didn't notice anything wrong.

Q. Was there any complaint made of anything of that kind by him?

A. No, sir.

Q. Or to the pectineus muscle of the left leg?

A. No, sir.

Q. No complaint of that kind and did you give any treatment at all to his left leg?

A. No, sir.

Q. Or have any occasion to do so?

A. No, sir.

Q. Now, his left arm tell us about that, whether there was any injury [fol. 245] jury to that?

A. There was an injury to his arm, some part of his arm. It was hard to locate at the time. He complained of it and continued to complain of pain in his arm. There was no external evidence of any injury.

Q. Do you know what is called brachial plexus, under the arm?

A. There is a brachial plexus, that is located in the back part of the neck and distributes branches to the arm from the cervical plane.

Q. It is kind of a collection of nerves?

A. Yes, sir.

Q. Is that under the arm, or is it up on the top of the shoulder?

A. No, it is beneath, runs into the scapula and from the cervical vertebrae it is distributed, different branches.

Q. Did you observe any bruising or anything of that kind to that region of the brachial plexus at any time while he was there?

A. No, sir.

Q. Was there any complaint of any bruising?

A. Well, there was complaint of pain in his arm which may have originated from a bruise there.

Q. But were there any external evidences of a bruise there?

A. No, sir.

Q. Or to the scapula was there any?

A. No evidence of any fracture of the scapula. I believe he received a blow in that region of the scapula, however, that was distributed over the scapula and the left side of the chest.

Q. At the same time that it struck the ribs?

A. Yes, sir.

Q. But there was no fracture of the scapula?

A. Not that I could detect.

Q. Did you discover any displacement or driving in of the scapula?

A. The scapula at that time I don't believe showed any evidence of being driven in; a little displaced at this time, however, on account of the little deformity of the chest; nothing that the scapula itself is responsible for.

Q. This deformity of the chest was caused by what?

A. By the blow which was struck fracturing the ribs.

Q. Was there anything about that displacement of the scapula that would not go back in place again?

A. Well, it is now in its normal place, except for the little depression in the chest wall which naturally causes it to show the same disfigurement. The over-lapping of the ribs there causes a little.

Q. When you examined the plaintiff in September, 1921, did you examine him with reference to this chest injury?

A. Yes, sir.

Q. What amount of contraction did you find there?

A. That amount that would be compensated for by the over-lapping of the ribs which I presume would amount to three-quarters of [fol. 247] an inch on the 5th, 6th, 7th, and 8th ribs, and particularly on the 6th and 7th.

Q. Would that cause any marked diminution of the chest area?

A. Not very much.

Q. How as to its effect upon his breathing?

A. It would cause some diminution. The chest is a little more rigid on account of the fractured bones and there is also some diminution of capacity. The chest on that side is not as large as it was originally.

Q. Is that diminution in the breathing power on that left side compensated in some other manner?

A. I believe it is to a great extent. That is, the chest wall is not compensated for, but the lung capacity and breathing is compensated for by the other lung doing more work than it did originally if it is necessary for it to do so.

Q. Do you think it is necessary?

A. It may be.

Q. You have examined him recently?

A. Yes, sir. Today.

Q. What is the situation today with reference to this injury to the left chest?

A. Practically the same as it was in September, 1921.

Q. Has there been any additional diminution in the breathing area?

A. No, sir.

Q. Something has been said here, Doctor, about there being about [fol. 248] a third in September, 1921, and now about half of the capacity of that left lung being impaired, what have you to say about that?

A. I cannot account for it. I don't know. I don't observe anything of that kind myself.

Q. Could you say about how much diminution you do observe there at the present time?

A. Only that that is accounted for by the fractured ribs and I could not give it in percentage because it is not extensive enough for that. There is only a portion of the ribs that have been affected and they are affected only to the extent of about three-quarters of an inch.

Q. What about this lung tissue being replaced by scar tissue?

A. Well, I cannot discover any destroyed lung or any compressed lung.

Q. Did you try to?

A. Yes, sir.

Q. How?

A. By all the means of physical diagnosis, listening, feeling, observing and so forth.

Q. If about half, Doctor, or even a third of that lung tissue was replaced by fibrous tissue, could you have discovered it?

A. I believe so.

Q. How would it make itself manifest?

A. Well, there would be a difference in the sound and a difference in the looks of the pictures as we observed them.

Q. Oh, you had X-rays taken today?

A. Yes, sir.

Q. Did you observe those?

[fol. 249] A. Yes, sir.

Q. Something has been said about a displacement of his heart, when he received this injury and following the injury while you had him under your care and observation, did you discover anything of that character?

A. No, sir.

Q. Did you have your attention called to that at all in any way?

A. Yes, in the court room here.

Q. Before that?

A. No, sir.

Q. Take your picture here that you took immediately after the accident, does that show the location of the outline of the heart?

A. Doesn't show it very distinctly, but it does to some extent.

Q. Does that picture show any abnormal position of the heart there at all?

A. No.

Mr. Anderson: Referring to which picture?

Mr. Palmer:

Q. Referring to the one you took immediately after the accident?

A. No.

Q. Well, referring to this one which was taken in January, 1921, can you see there the outlines of the heart?

A. To some extent.

Q. Can you indicate where that is?

A. The light colored portion up there where your hand is at the [fol. 250] present time indicates the location of the heart.

Q. Can you discover any abnormal location of that heart?

A. No, sir.

Q. So far as can be observed in both of these pictures, is it normal?

A. So far as I am able to observe from the picture, I believe it is normal.

Q. Did you examine the plaintiff today?

A. Yes, sir.

Q. With reference to the location of his heart?

A. Yes, sir.

Q. What did you find?

A. Found the heart in just about normal position.

Q. And as to the enlargement of the heart, did you find anything about that?

A. I cannot see that it is enlarged, either from the pictures or from any physical examination that I am able to make.

Q. It has been testified here that it is enlarged on the right side, I think to such an extent that it is pushed up over on the left side about an inch or something like that, did you find anything of that character?

A. No, sir. The apex of the heard may be a little towards the left, but it is so trifling that I would not take note of it in any case and call it a pathological, unhealthy, diseased condition.

Q. Then you would not say that there was any abnormal or unhealthy condition of his heart?

A. No, sir.

[fol. 251] It has been testified here that this enlargement has been caused by difficulty of the heart pumping blood into the scar tissue; would a condition of that kind if it existed cause any abnormal condition of the heart?

A. Assuming that that condition did exist?

Q. Yes.

A. Oh, it might to some extent.

Q. But you did not find any such condition existing?

A. I did not find any.

Q. There has been some testimony here that this man if he makes a sudden exertion might drop dead, something about a block in his heart, what is your judgment about that from your examination of him and the history of his case?

A. I do not see anything to justify any such belief.

Q. And the present condition of his left arm, what will you say as to that?

A. There is undoubtedly some nerve condition there and it is probably due to some former injury to the ulnar nerve and while it is not very apparent, there does exist some slight atrophy, along the border of the little finger. There is also some atrophy of the muscles of the arm, the biceps. There is also some atrophy of the arm higher up; whether that could be accounted for by this injury to the nerve or something else I cannot say.

Q. How marked is this atrophy?

A. There is about three-quarters of an inch, I believe, smaller on [fol. 252] the injured side than it is on the right.

Q. Did you make any test as to his gripping capacity, of this left hand?

A. No, except what he has been able to manifest himself.

Q. Did you discover anything wrong?

A. Well, he doesn't seem to have as much grip in that hand as he does in the other.

Q. Then this condition of the left arm, this ulnar nerve, would you call that a bruising of the nerve?

A. It might have been the result of a direct blow on the nerve.

Q. And your opinion as to whether that will improve, Doctor?

A. I do not believe that after this length of time there is going to be a marked improvement in it. It may improve some.

Q. What is the effect on the use of the arm?

A. That would have a tendency to improve it and to better it generally.

Q. What is your idea and best judgment as to his ultimately being able to use that arm?

A. I think he could. I think he can now.

Q. Is the use impaired by this condition of which you speak?

A. It is impaired to the extent of the little finger and possibly a portion of the next one to it, not the entire finger, but even that does not render that finger useless.

Q. To what extent does it impair its usefulness?

[fol. 253] A. Well, I could not give it in percentages, but it is not as strong as it would normally be. Maybe impaired 25, 50 per cent. I don't know.

Q. That is, this little finger?

A. Yes.

Q. How about the condition of the pain, in your judgment in that arm?

A. Well, I don't know. He may still have pain there. Ordinarily the pain diminishes as time goes on.

Q. The sciatic nerve of this left leg at the present time, Doctor, did you find anything wrong with that?

A. Nothing to indicate anything wrong.

Q. Is there anything to indicate anything wrong with this pectineus muscle?

A. No, sir.

Q. You can find nothing of that kind?

A. No, sir.

Q. Did you apply any tests to find if he had anything wrong with this sacroiliac joint?

A. Nothing but the motions that I put him through. Of course, that is within his own control to a considerable extent.

Q. Did you find anything to indicate injury to the sacroiliac joint?

A. Well, there is nothing that would indicate except that there is some apparent rigidity of the muscles there when his leg is being manipulated.

Q. And that would be, as you say, within the patient's own control?

A. Yes, sir.

[fol. 254] Q. Nothing objective, nothing that you could see or feel?

A. No.

Q. Were you present when some X-ray pictures were taken today by the plaintiff?

A. Yes, sir.

Q. I call your attention to this Defendant's Exhibit 4; is that one of them?

A. Yes, sir.

Mr. Palmer: I will offer it in evidence.

Mr. Anderson: Yes, that is all right.

Q. Take this Exhibit 4, what does it show?

A. It shows the pelvis of the plaintiff and the hip joints and a part of the lumbar vertebrae, sacrum, sacroiliac joints.

Q. Can you see there, Dr. Sarazin, the sacroiliac joint?

A. Yes, sir. This piece here that you see that looks like a butterfly almost with straight wings, the extreme edge of what would be the wing, is the joint.

Q. Do you see that line there between the ilia and the sacrum?

A. Yes, sir. That constitutes the joint.

Q. The top of that line is that perfectly smooth apparently there?

A. Absolutely.

Q. And the bottom, is that smooth?

A. Yes, sir.

Q. And the same on the right. That was taken with the patient lying how, do you remember?

A. On his back.

[fol. 255] Q. At any rate does that show the sacroiliac joint?

A. Yes, sir.

Q. It has been said here that an X-ray plate does not disclose the sacroiliac joint and its condition, how about that?

A. Well, that shows it very beautifully as far as any displacement concerned.

Q. Now, is there anything on this Exhibit 4 that shows any abnormality or displacement whatever of that sacroiliac joint?

A. Not that I can see.

Q. And if there were one would it be shown there, in your judgment?

A. I think it would be very apparent because the picture is a clear one.

Q. Exhibit 4 is a very clear picture of the joint?

A. Yes, sir, much clearer than some pictures you see.

Q. I suppose from that, Doctor, you could not determine anything about the sciatic nerve or the pectineus muscle?

A. No, sir.

Q. Defendant's Exhibit 5, is that another X-ray picture that was taken today in your presence?

A. Yes, sir.

Q. And what does that show, Dr. Sarazin?

A. That picture is identical with No. 4.

Q. The same view of the Pelvis?

A. Yes, sir.

Q. Does that disclose any abnormality or displacement whatever of the sacroiliac joint?

[fol. 256] A. No, sir.

Q. And if there were one, in your judgment, would it be disclosed there?

A. Yes, sir.

Mr. Palmer: We will offer No. 5 in evidence.

Mr. Anderson: No objection.

(Defendant's Exhibit 5 received.)

Q. This is Defendant's Exhibit No. 6, Doctor Sarazin, is that an X-ray of the plaintiff that was taken today in your presence?

A. Yes, sir.

Q. What does that show?

A. That shows the lungs and heart and chest, ribs, the collar bone.

Q. Will you show us what represents the lungs?

A. The dark part on both sides represents the lungs.

Q. And the ribs?

A. Yes, sir.

Q. Does that show these fractured ribs?

A. Yes, sir, very distinctly.

Q. And shows them healed?

A. Yes, sir.

Q. What sort of a union there?

A. Very good union.

Q. Take the 5th, 6th and 7th that are shown there, how much over-lapping is shown there?

A. About three-quarters of an inch, I would say. I cannot estimate the over-lapping from the point of the bones because they are fractured on a bias.

Q. Do you see anything on that side of the chest to indicate the [fol. 257] destruction of lung tissue?

A. No, sir.

Q. On any part of it?

A. No, sir.

Q. And if there were destruction of the lung tissue there to the extent of a third or a half would it be apparent?

A. I think it would.

Q. How would it be shown?

A. It would be shown by a very light color all through the lung substance; that is, where it is not interfered with by some other object.

Q. The location of that heart as shown by that picture, is there anything abnormal about it?

A. No, sir.

Q. Any displacement about it at all?

A. No, sir.

Q. Any enlargement at all?

A. No, sir.

Q. So far as you can observe is it a normal heart and in a normal position?

A. Yes, sir. That is the same as those were taken for stereoscopic view.

Q. No. 7 is the same as No. 6?

A. Yes, and unless they were used in conjunction would not mean anything.

Q. No 7 is an X-ray taken of the plaintiff's chest at the same time as the others?

A. Yes, sir.

Mr. Palmer: I think we have offered them all, 4, 5, 6 and 7.

Mr. Anderson: Well, I don't think so, but they may be considered [fol. 258] in evidence so far as the record is concerned.

Q. I call your attention, Dr. Sarazin, to this X-ray picture, Plaintiff's Exhibit D, said to have been taken February 10th, 1923, of the plaintiff's lung; I want to ask you if you discover anything that shows an abnormal condition of that left lung?

A. No, sir.

Q. It has been testified here that this light area showing there on that side, would indicate this is scar tissue of the left lung, that is, the air cells were destroyed and that sort of thing. Does that light area indicate any such thing?

A. No, sir.

Q. Why do you say that?

A. Because it is just simply a shadow of the heart, just the same as this one here. This picture is taken with the plaintiff lying on his face and that area there is the shadow cast by the heart.

Q. Just simply the shadow of the heart?

A. Yes, sir.

Q. The same as it is on Exhibits 6 and 7?

A. Yes, sir.

Mr. Palmer: That is all.

Cross-examination.

By Mr. Anderson:

Q. Dr. Sarazin, how long have you been general surgeon of the Soo Railway at Superior?

A. Well, I would not know exactly in years, but ever since they [fol. 259] came in there which may be twelve years.

Q. And are you employed in such position on a salary?

A. No, sir.

Q. Compensated with reference to the number of Soo Railway employe patients, that you have?

A. I make a charge for anything that I do for them.

Q. That was true, was it in 1920?

A. Yes, sir.

Q. And you are also surgeon for the other railroads centering into Superior, the Great Northern—

A. Yes, sir.

Q. —Northern Pacific, South Shore and Atlantic?

A. Yes, sir.

Q. That is the chief part of your business, isn't it, the railroad business?

A. No, I have a general practice.

Q. When the plaintiff came to the hospital and was placed under your charge and on the night when you first saw him and examined him, did you come to the conclusion at that time that he was a very dangerously injured man?

A. I come to the conclusion that he was seriously injured.

Q. Do you wish to be understood by that eliminating the word "dangerous?"

A. Well, I don't know in what sense you use it exactly.

Q. Danger to his life, serious doubt as to whether he would survive [fol. 260] his injury?

A. No, I didn't have any doubt about his surviving.

Q. Did you a day or two later?

A. I don't think so.

Q. Are you sure of that?

A. Yes, sir.

Q. By the way, Doctor, in testifying here about something that occurred so long ago, are you relying entirely upon your memory?

A. To a great extent, yes, sir.

Q. Didn't you take notes of this individual case at the time and keep notes in connection with your examination and treatment?

A. I have some records on my books.

Q. With you?

A. No, sir.

Q. When you made the examination on the night in question and you made your subsequent examinations, didn't you keep full notes of what you found wrong with your patient?

A. I recorded anything of interest.

Q. Well, wouldn't you record and enter on those notes each place where you examined him and found something wrong?

A. Yes, sir.

Q. And wouldn't your notes show whether or not you made an examination at any time while he was in the hospital of his leg and hip?

A. If there was anything discovered by it, I presume.

Q. Well, have you looked at your notes to see?

[fol. 261] A. Yes, sir.

Q. Why didn't you bring them with you?

A. It would be quite a load to carry all of those notes in a very large book and I didn't think it was necessary, nor was I asked.

Q. Without referring to the notes, then, you have to depend upon your memory as to each detail when questioned in this matter?

A. Yes, sir.

Q. And I presume that at or about the time of this accident you had a number of patients, did you not?

A. The usual number, I presume.

Q. What is the usual number?

A. I don't know just what it might have been at that time, there is always more or less work; sometimes quite busy and sometimes not so busy.

Q. Don't know whether you were busy at that time or not?

A. I don't remember just what it was.

Q. When did you find it necessary to give your patient, Mr. Goneau, something to lessen the pain, when did you commence to doing that?

A. As soon as he entered the hospital.

Q. What did you give?

A. I presume I used morphine.

Q. How long did you continue giving him morphine?

A. Not very long. Those things are not given any more than we can possibly help. Of course, it would depend on his pain, but I [fol. 262] don't think it exceeded two weeks and that probably in diminishing dose.

Q. You have in connection with the care of Mr. Goneau a notation of every time such an injection or treatment was given?

A. I presume that that was recorded at the hospital. I did not make a note of it myself.

Q. Or in the nurse's record, wouldn't it be there?

A. Yes, sir.

Q. Of course, that is kept by the nurse for you as the surgeon in charge?

A. Yes, sir.

Q. You have none of those records with you?

A. No, sir.

Q. Speaking with reference solely to plaintiff's leg and hip, I believe you stated that so far as you could remember plaintiff never made any complaint to you about trouble in that region?

A. No, sir.

Q. Are you sure of that?

A. I am positive.

Q. Ever look at your notes to see whether you had any notes on the subject?

A. Why, I have looked over everything I have on the subject.

Q. When did you look it over?

A. At various times.

Q. When was the last time?

A. I think in the course of the last week.

Q. And I take it from what you stated that you examined his left leg?

[fol. 263] A. Yes, sir.

Q. Sacroiliac joint yesterday?

A. Yes, sir.

Q. As well as preparatory to testifying in September, 1921?

A. Yes, sir.

Q. Found nothing wrong?

A. Well, there was some manifestations of pain; outside of that I couldn't find anything.

Q. Where were the manifestations of pain?

A. Through the hips and in the left leg.

Q. Around the sacroiliac joint?

A. Well, not particularly around the joint; all through the left side of the ilium and pelvis.

Q. Make the test, did you, of raising his leg up and bringing the knee up towards the chest?

A. Yes, sir.

Q. That is one of the well recognized tests, isn't it, when you are testing out as to whether you have a sacroiliac joint injury?

A. Well, I don't know as it is recognized as being able to throw any light on the subject especially.

Q. What are the tests, then, resorted to by physicians and surgeons to ascertain whether you have a sacroiliac joint injury?

A. Manipulation of different kinds, drawing the knee up sideways and in various directions and if there is a manifestation of pain, of course, it is recorded. Those are all tests used.

Q. I notice one of the tests you mention is drawing the knee up, [fol. 264] that is the same thing you understood me as asking, isn't it?

A. Yes.

Q. Did you do so yesterday?

A. Yes, sir.

Q. And could you tell whether or not the plaintiff suffered pain while you were doing that?

A. No, I could not.

Q. Did you ask him?

A. Yes, sir.

Q. What did he say?

A. He said he did.

Q. Ask him where?

A. Yes, sir.

Q. Where did he say it was?

A. In his limb, in his pelvis and in his back.

Q. Where it would be if he had a sacroiliac joint injury?

A. Yes, he probably would have pain in that particular locality if he had a sacroiliac injury.

Q. You notice the way the plaintiff walks, Doctor?

A. Yes, sir.

Q. And he limps, doesn't he?

A. Yes, sir.

Q. Is that a limp that is characteristic of a sacroiliac joint injury?

A. Not necessarily. He might limp that way with an injury to the sacrum and its joint.

Q. As I understand your position, you want to be understood as saying and believe he hasn't got anything wrong with that sacroiliac joint?

[fol. 265] A. I haven't been able to determine anything specific about it. He may have. I am not stating that he has positively no injury there, but as far as I can determine I haven't found any injury.

Q. But I suppose you remember just as accurately the way he walked a year ago last September as you remember about your examinations in October, 1920?

A. Yes. I have an idea how he walked at that time.

Q. And at that time he was using a cane?

A. Yes, sir.

Q. If a man has a sacroiliac joint injury and is able to walk as much as you see the plaintiff walking, is that limp of his characteristic of that injury?

A. It is not particularly characteristic of an injury.

Q. I do not mean exclusively?

A. I presume he would limp just about in that way.

Q. What other injury to the hip or leg would cause that kind of a limp?

A. An injury to any of the pelvic bones or even to the hip joint would cause that same limp.

Q. When you come to the hip joint you can tell a great deal by an X-ray picture, can't you?

A. Generally, yes, sir.

Q. But you can tell very little about the sacroiliac joint injury by an X-ray, isn't that true?

A. No, I don't believe so. I believe if there was any separation there to amount to anything it would be noticeable in the X-ray picture.

[fol. 266] Q. When you take an X-ray picture the man is relaxed, isn't he?

A. Ordinarily.

Q. When you are taking one of the sacrum, he is relaxed, isn't he?

A. Yes, sir.

Q. When you take those pictures you try to have him relaxed, don't you?

A. As much as possible.

Q. And when you took these pictures of the sacrum yesterday you had him lying on his face?

A. No, on his back, I think.

Q. And straight?

A. Yes, sir.

Q. You know that these pictures were taken in the proper way for an X-ray picture of the sacrum?

A. Yes, sir.

Q. And you know that he was lying perfectly straight?

A. Appeared to be.

Q. Well, didn't you doctors see to it that he did before you took the picture?

A. Well, that would be absolutely impossible, to cause him to relax every muscle in his body. I presume they were relaxed.

Q. Well, I say lying perfectly straight?

A. Yes, he appeared to be.

Q. Legs down even side by side?

A. Seemed to be.

Q. Back bone straight in the natural way?

A. Seemed to be.

Q. And when you take an X-ray picture of the sacrum in that [fol. 267] way, if the man is in normal position the crests of the ilia, you would expect to find those on a parallel plane, wouldn't you, the same height?

A. Not necessarily.

Q. What do you mean by that?

A. The least deviation might throw them out of kelter. He might draw one side up or relax it a little without its being apparent to the physician.

Q. What do you mean by that?

A. I mean by contracting the muscles that control those places.

Q. The bones known as the ilia are solidly united with other bones, all making up what is called the pelvic bone, isn't it?

A. Yes, sir.

Q. There are the ilia and the two pubic bones, aren't there, one on each side?

A. Yes, sir.

Q. And what else?

A. The sacrum.

Q. Yes, that is in between; that is the extension or continuation of the back bone, isn't it?

A. Yes, sir.

Q. So that we have in making up the pelvic region five bones, have we?

A. There are more bones than you mention there. There is the ischium. It is that part a person sits on.

Q. Two of those?

A. Yes, sir.

Q. Well, then, there are seven bones and the six bones, leaving [fol. 268] out the sacrum for the time being, are fastened together, aren't they, solidly?

A. Yes, sir.

Q. And united to each side below is the leg bone, the femur, by a joint?

A. Yes, sir.

Q. Now, a man is lying on his back, as you say the plaintiff was, how is he going to move those six solidly united bones to raise one crest above the other?

A. By tilting the pelvis. Drawing the muscles up.

Q. What muscles?

A. The abdominal muscles are the principal ones, and some of the muscles of the back.

Q. You had him stripped naked, didn't you?

A. He was under cover.

Q. A sheet?

A. Yes, sir.

Q. Yes, but do you want to be understood as saying he could do that without you doctors seeing him do it?

A. Absolutely.

Q. Did he do it?

A. I don't know.

Q. Could you tell from the picture whether he did it or not?

A. I could tell if he did it to any great extent.

Q. What do you mean by great extent as shown by the pictures?

A. Tilt it materially.

Q. Would it have any effect upon the back bone if he elevated the [fol. 269] one side?

A. It might cause a little deviation of the spine.

Q. How much lower is the left ilia there than the right one on that picture?

A. I don't know.

Q. Now, isn't that level?

A. Yes, it is level.

Q. Then this right ilia is at least half an inch higher than the left, isn't it?

A. I would say so.

Q. You were asked the question about these lines on either side where the sacroiliac joint is?

A. Yes, sir.

Q. That dark line that I am pointing to indicates that there is not a solid continuation of bone straight across, doesn't it?

A. It shows that joint.

Q. Never mind. It shows where the sacrum ends and the ilia begins at that region, doesn't it?

A. Yes, sir.

Q. As you look direct against that line, isn't there solid bone right behind it?

A. There is.

Q. You don't go straight through to get to the other side of the joint, but you go through at a sharp angle, down towards the center?

A. The other side is over there.

Q. And so a picture never shows through a sacroiliac joint as it does through joints where the back bone, vertebrae, are joined together?

A. It shows through to a certain degree, dependent largely upon the focus.

[fol. 270] Q. Well, take those pictures, this is a straight focus, isn't it, right angles?

A. Yes, sir.

Q. It doesn't show through there, does it?

A. It does, yes, sir.

Q. Which side are we looking at here, front or back?

A. Front.

Q. How can it show through when the joint on the back side is probably three-quarters of an inch out of a direct line with the one in front?

A. It shows through because there isn't as much difficulty of penetration where the joint sets in the back as there would be otherwise.

Q. But the rays penetrate straight down, don't they?

A. Yes.

Q. Then the ray that shows that outline there on the front strikes the solid bone right behind, doesn't it?

A. Yes, sir.

Q. And those other rays are striking the other side of the joint, aren't they?

A. Yes, sir.

Q. Now, you say that you feel that an X-ray would show a separation if there was any, is that right?

A. Yes, sir.

Q. Let me ask you this: If an accident had happened whereby the sacroiliac joint was opened, separated, sufficiently so as to show it on an X-ray picture, could such a man walk?

[fol. 271] A. I don't believe that it would be very easy for him to walk with a complete separation of the joint.

Q. What do you mean by a complete separation?

A. A severing of all the bone connections in the joint.

Q. The older a man becomes the harder grows that connection between the joints up to a certain period, is that true?

A. Yes, sir.

Q. And when a man reaches the age of thirty-one or two, has that hardening process about reached its maximum?

A. Practically, I would think, although the bones become more calloused as it goes on.

Q. And of course with children and younger people the connection between the two bones is softer?

A. Yes, sir.

Q. So that in this case, with this man thirty-two or thirty-one years of age at the time, if that joint had been injured in this accident to such an extent that an X-ray picture, such as we are looking at here, would show that it was completely separated and severed, could he walk?

A. I don't believe he could.

Q. Could he walk now, two and a half years after the accident?

A. He could.

Q. Isn't it very doubtful?

A. No.

Q. What would make him walk?

[fol. 272] A. Union of the bones.

Q. If there is a union of the bone would the X-ray show the separation now?

A. If there were any distortion it would.

Q. If there was union of the bone without distortion, would it show?

A. If there was an absolute union without any distortion or any additional deposit of bone, which naturally would follow, there probably would not be any marked expression by X-ray.

Q. Well, having a sacroiliac joint so injured as to have a complete separation, and then afterwards a reunion takes place, is that man able to walk without a limp over, under those conditions?

A. If he has an absolute union and the bones are not injured in any way, solid together, there is no reason why he should not walk as well as he did before.

Q. The sacroiliac joint injury is a serious injury?

A. Very serious injury.

Q. Where you have a severe sprain or strain of the parts around that joint it is more or less serious, according to the degree of the strain, isn't it?

A. Yes, sir.

Q. If the plaintiff in fact on October 27th, 1920, received such an injury to his left sacroiliac joint of such a character and so extensive that now, two and a quarter years afterwards, he cannot walk without this marked limp, assuming that to be the fact, have you any reason to believe that that leg in the future will become so he [fol. 273] can walk on it without a limp?

A. That depends a great deal on the character of the injury and whether it was confined to the ligaments or just a strain or a complete separation.

Q. Assuming now that he had an injury there, assuming that he is limping now because he cannot help it on account of that injury as you see him limping what character of an injury did he have, in your judgment, then?

A. I don't know what character of an injury. I saw no evidence of any injury at any time.

Q. I am assuming that these things occurred, now?

A. Well, assuming that he did have trouble there, it is dependent on a whole lot of different causes.

Q. This limp?

A. Yes, sir, for the injury or a diseased condition of the sacroiliac joint.

Q. Well, is there any disease in this joint?

A. I don't see any, any more than any incidental pathological condition.

Q. We will assume for the purpose of this question that in this accident in October, 1920, the plaintiff's left sacroiliac joint was injured and was so injured that now, two and a quarter years after the accident, he cannot walk any better than you see him walking here, limping as he limps in your presence and sight—

Mr. Palmer: Your Honor, I am constrained to object to that question as assuming facts not established by any testimony.

[fol. 274] Mr. Anderson: Assuming that to be true, and so there will be no mistake, and assuming that this limping, crippled condition is caused solely by an injury to the sacroiliac joint, then I ask you as a physician and surgeon, taking into consideration the lapse of time, two and a quarter years, have you any reason to think that that leg will get materially better in the future?

Mr. Palmer: Now, that is certainly objected to as assuming several facts not established by any testimony in the case, not cross examination. It seems to me, your Honor, you might assume certain symptoms existed, but to assume the ultimate conclusion and then ask the doctor to agree with that conclusion is improper. You cannot assume the whole conclusion from all of the facts; the conclusion has to be found by the jury.

Mr. Anderson: Do you also object to it on the ground it is not proper cross examination?

Mr. Palmer: Yes.

Mr. Anderson: Then I withdraw the question. I don't want any mistake. I doubt if you did go into that subject yourself, so I will withdraw that question.

Q. Doctor, in making your examination a year ago last September and in making your examination yesterday, I think you stated you could find no evidences of an injury to the sacroiliac joint, no objective symptoms?

A. Yes, sir.

Q. But I think you have already stated that you did notice then [fol. 275] and you did notice in September, 1921, that the plaintiff walks with a limp which would be—not exclusively now—but which would be characteristic of a sacroiliac joint injury?

A. Yes, sir, I believe so.

Q. If he has no disease of that joint and he has no rheumatism and was not injured anywhere else about his person so as to cause any limp, doesn't that necessarily mean one of two things to you, that the plaintiff had an injury to his sacroiliac joint that causes his limp or that he is pretending that he is lame?

A. No, sir, it does not. It might mean a number of other things, two or three other things that might cause a limp, a slight limp.

Q. Will you name one of them?

A. A hip joint disease.

Q. Has he a hip joint disease?

A. He has not.

Q. Did you discover any other injury to the pelvis?

A. I discovered no other injury.

Q. Anything else that could cause that limp other than what you mention?

A. Any other traumatic conditions that might injure the pelvis or even the lower part of the spine or muscles or nerves in that vicinity might cause a limp just the same as he has it.

Q. All these that you mention excepting the disease part of it would be a limp from an injury?

A. Yes, sir.

Q. Now, going back to the Exhibit 4, why is that left ilium half [fol. 276] an inch or such a matter lower than the right one there on that picture?

A. Because for two years and a half he has been favoring that limb and walking on it with his pelvis tilted and I am surprised that there isn't a more marked expression than there is there on the pelvis today.

Q. So your idea is that he was lying straight when the picture was taken, didn't have his bones drawn up and distorted by muscular effort, but that that is a fixed position because of his long time limping?

A. It might be a condition existing there entirely independent of anything that he had control over.

Q. And that, you mean, is because for two years or more he has been walking with a limp, is that it?

A. Yes, sir.

Q. And by that you mean that he has commenced walking with that leg about a month or so after the accident with the use of a cane and he kept using that cane until 1922 and since that has walked without a cane, and the result of that has been that his right

leg has been doing most of the work and the other has been favored and it has kind of pushed the right side up and let the left side down, is that about the size of it?

A. Yes, sir, in limping he raises one side higher than he does the other.

Q. But this position shown on Exhibit 4 is when the man is lying down and relaxed as far as you know he could be relaxed, is that right?

A. Yes, sir.

[fol. 277] Q. And if the tipping of the pelvic bone was simply caused while walking, that tip would disappear, wouldn't it, when he lay down?

A. No, it becomes secondary nature.

Q. And stays there?

A. Until he gets to using it again the same as he does the well side.

Q. Well, then, that indicates to you that he has been walking with a limp and favoring the left leg very much for a long time, doesn't it?

A. It would indicate that there had been more muscular development on the right side than there is on the left.

Q. What do you mean by indicating that there has been more muscular development?

A. His muscles draw the right side up and the other is relaxed.

Q. Could he do that voluntarily and keep it up for a couple of years?

A. I presume he could.

Q. Rather hard work, wouldn't it?

A. I presume it would.

Q. Now, doesn't that picture, Defendant's Exhibit 4, have some weight with you to the end of deciding that this man must have an injury in that region?

A. No, sir.

Q. Well, that is a deformity, isn't it?

A. An apparent deformity.

Q. What do you mean by an apparent deformity?

[fol. 278] A. It is more apparent than real. No disfigurement that would account for it in any way.

Q. Look at Plaintiff's Exhibit B and compare it to Defendant's Exhibit 4 and tell me in which one of those pictures is the ilia tipped the most?

A. In the last picture.

Q. Very marked difference, isn't there?

A. Quite a difference.

Q. How do you account for that?

A. Prolonged position.

Q. Does it follow that if he has to go on limping for another year or two years that it will tip even more?

A. It may.

Q. Is it likely to?

A. I don't believe it. Still, I don't know. I can't say positively, and then, on the other hand, the position on the table may have been a little different at the time.

Q. I call your attention to the spinal column that shows in Exhibit B of the plaintiff, so far as you can see it is right straight up and down, isn't it?

A. Apparently.

Q. It shows straight, doesn't it?

A. Apparently.

Q. And if the back bone had been bent in connection with the twisting of the ilia or raising one leg by muscular exertion, where would the bend take place in the back bone?

A. Considerably higher than that.

Q. Would it be higher than what is shown on Exhibit B?  
[fol. 279] A. It probably would start at that point.

Q. Where it shows now?

A. At the terminal, but there would be no deviation with that amount of distortion.

Q. Now, when a man's ilia are tilted as badly as in Exhibit 4, doesn't it necessarily follow that there is a bend somewhere above in the back bone?

A. It would be a long curve and I don't think would be very apparent.

Q. Would it be harmful?

A. I don't believe so.

Q. Did you measure the left leg at the thigh as compared to the right?

A. Yes, sir.

Q. What was the difference?

A. I think there was about three-quarters of an inch difference.

Q. Measure the calf?

A. Yes, sir.

Q. What was the difference?

A. About the same.

Q. What is the cause of the difference in size of the two legs at the thigh and the calf?

A. Well, barring all pathological conditions, I know of no cause except non-use. Favoring it and the mere fact also that a slight degree of difference exists ordinarily. There is always more or less difference between the right and left limb in normal people; would not account for that degree, however.

Q. When you say slight difference it runs along about a small [fol. 280] fraction of an inch, something like a sixteenth to a twelfth or eighth?

A. Fourth sometimes.

Q. With a perfectly normal working man that uses both legs all the time in his work, did you ever find any material difference that you could discover?

A. Yes, there is always a difference.

Q. What makes a difference in working men between the right leg and the left leg?

A. The right side is used a little more. It is not material.

Q. This is entirely too much to be accounted for in that way, isn't it?

A. Yes, sir.

Q. How else do you account for it?

A. The only way I can account for it is by atrophy or non-use of the muscles in that locality.

Q. What causes the atrophy?

A. Non-use.

Q. What does the word atrophy mean?

A. Wasting away.

Q. From the non-use of the leg that causes an atrophy or shrinking of three-quarters of an inch at the calf, what are the conditions and circumstances under which you would expect to find that much shrinking? Could you produce it simply by what you call non-use?

A. Yes, a great deal more than that.

Q. That is, if you put a man in bed and he doesn't use his leg it shrinks, doesn't it?

A. Yes.

Q. Both of them shrink then don't they?

[fol. 281] A. Yes, I presume if they were subjected to the same conditions.

Q. The left leg won't shrink any more than the right one, will it?

A. Not a bit.

Q. But when you take a man who has an injury to his left leg such as the plaintiff claims in this case and he begins walking some months after the accident and walks for many, many months with the help of a cane, he is exercising that left leg every time he takes a step, isn't he?

A. Yes, sir.

Q. And when he walks from the summer of 1922 down to the winter of 1923 without the use of the cane, every step he takes he exercises the left leg?

A. Yes, sir.

Q. And he takes just as many steps with the left leg as with the right?

A. Yes, sir.

Q. And when he steps upon that left leg and raises himself and takes his right leg forward, he is using the muscles of his left leg just as much as the right?

A. Not if he is limping or supporting it. If you are limping on it you are not exposing it to the entire weight of the body for as long a period.

Q. And you want to be understood as saying that that slight difference in the use of that leg has made the calf three-quarters of an inch smaller?

A. Well, I wouldn't say that.

[fol. 282] Q. What has made it three-quarters of an inch smaller?

A. I don't know to what extent he has used it.

Q. The thigh is a good deal bigger than the calf, isn't it?

A. Yes, sir.

Q. He has a good, well developed thigh on his right leg?

A. Yes, sir.

Q. And when you speak about shrinking from non-use, the shrinkage is in proportion to the original size of the part shrinking?

A. Yes, sir.

Q. Why is it that the calf has shrunken as much as the thigh?

A. It hasn't shrunken at all compared to the right.

Q. The calf?

A. Yes, sir.

Q. You said it was three-quarters of an inch smaller?

A. The thigh.

Q. Well, I asked you about the calf and you said three-quarters of an inch?

A. No, excuse me. I found a difference of three-quarters of an inch in the comparative measurements of both thighs.

Q. How about the calf?

A. None.

Q. Then in this case from non-use the thigh has shrunken three-quarters of an inch?

A. Yes, sir.

[fol. 283] Q. And the calf none at all?

A. Yes, sir.

Q. What is the matter with the calf, why didn't it shrink?

A. The muscles of the calf may be subjected to more exercise than the muscles above by raising himself on his toes.

Q. Well, you always raise yourself on the toes when you walk, don't you? He would not raise himself on the toes any more if he had a crippled foot than if he did not?

A. He may. He seems to be walking on his toes, doesn't put his heel down to the ground very much.

Q. How much smaller is that left arm than the right arm at the biceps?

A. At the biceps it is about a half an inch, I think, smaller than the right arm.

Q. Didn't you take measurements, didn't you make notes so as to tell us?

A. It is very difficult to get an exact measurement.

Q. How much smaller is the left hand around the palm than the right hand?

A. There isn't much difference.

Q. Half an inch, isn't there?

A. I don't believe there is that much difference.

Q. Have you a tape line with you?

A. No, sir.

Q. Would you mind having the plaintiff come up and take a measurement of his left hand here and his right hand?

[fol. 284] A. All right, sir. (Witness does so).

Q. How much is it?

A. Seven and seven-eighths.

Mr. Palmer: Around his left hand, is that it?

A. Yes, sir.

Mr. Anderson:

Q. Now, how much is that, Doctor?

A. Eight and a sixteenth, plus.

Q. Isn't that right opposite the eighth, isn't it just a little short of being opposite even; in other words, it is a full eight and one-eighth?

A. I think it is minus an eighth.

Q. So there is a quarter inch difference in the palm of the hand?

A. Yes.

Mr. Palmer: Eight and one-eighth right hand.

Mr. Anderson: Eight and one-eighth right hand, seven and seven-eighths left hand.

Q. Now, you noticed in examining his left hand that his little finger was materially smaller than the right little finger, didn't you?

A. No, sir. They are not materially different.

Q. I didn't really mean that; noticeably?

A. Yes, they were noticeably different.

Q. How much smaller was his forearm on the left side than the forearm on the right?

A. Just a small fraction of an inch. Now I would not be positive about that. I don't believe it was over an eighth.

Q. And the biceps, I think you said, about a half?

A. About a half an inch.

[fol. 285] Q. And I think you testified that he has an injury to the ulnar nerve?

A. Yes, sir, to some portion of it anyway.

Q. Is that a permanent injury?

A. Well, I believe that the fibers that show some evidence of injury there, would probably be a permanent injury. Maybe some improvement with change of occupation, exercise and one thing and another.

Q. What causes the difference in size of the biceps of the left arm as compared to the right arm?

A. I cannot account for it unless it is non-use.

Q. The ulnar nerve injury would not account for that?

A. I don't believe so.

Q. Does the ulnar nerve have anything to do with the feeding and supporting of the biceps or that part of the arm, I mean?

A. I don't believe so.

Q. And you say the lower arm is one-eighth of an inch?

A. About an eighth of an inch.

Q. Is that just from non-use?

A. I believe so.

Q. Well, you did not find the arm, then shrunken as much as the leg?

A. In proportion it might be.

Q. Now, we come to the chest wall; you found the 5th, 6th, 7th, 8th and 9th ribs separated of course?

A. Yes, sir, broken.

[fol. 286] Q. And as you looked at it and examined him and took care of him you came to the conclusion that he had received a very heavy blow to cause that injury, did you not?

A. Yes, sir.

Q. I think you have already testified that when you saw him that night there was not much external marking?

A. Yes, sir.

Q. Abrasions, just a rubbing of the skin?

A. Yes, sir.

Q. And you did not find any abrasions on the back down by the sacrum, did you?

A. Well, there may have been some slight abrasions.

Q. I mean that night?

A. No.

Q. There was no black and blue, then, that you found?

A. No, sir.

Q. But afterwards there was something?

A. There was some evidence his having—

Q. I think you testified that if he had an injury down there sufficient to cause a separation of the sacroiliac joint you would expect to find external marks?

A. I would expect to find a whole lot of trauma, violence, to the entire pelvis.

Q. And of course, it would take a much heavier blow to completely separate the sacroiliac joint than it would to merely stretch and strain the ligaments?

[fol. 287] A. That, I presume, would depend on how the blow was delivered.

Q. Couldn't you strain and stretch this sacroiliac joint by falling from a bridge and your leg being thrown in certain unknown positions?

A. Yes, sir.

Q. Giving a twist and turn to that joint?

A. Yes, sir.

Q. If that were done, there would be no external bruises, would there?

A. There might not be.

Q. And if there were no external bruises would there be external marks?

A. No, sir.

Q. And a severe strain of the sacroiliac joint is very frequently serious, isn't it?

A. Yes, it is a serious condition.

Q. And you have known it in the history of your practice and reading medical works that where a separation has not taken place,

but there has been a severe strain, a person is crippled for life, haven't you known of it?

A. No, sir.

Q. I do not mean completely disabled, but partially?

A. No, where it is limited to a mere strain I do not know of any reason why a person should not get entirely well, if there is nothing to interfere with it.

Q. Did you help take this Defendant's Exhibit 12 after the accident?

A. Yes, sir.

[fol. 288] Q. When those ribs were crushed, that does not mean that the ribs and the broken ends simply broke and stopped right where they are in that picture does it?

A. Not necessarily.

Q. In other words, with that crushing blow, they could have been driven into the lung and then sprung back, couldn't they?

A. Yes, sir.

Q. Isn't it, in your judgment, a proper explanation to make of the fact that this man was raising blood, as you say, for a couple weeks afterwards, that the lung tissue was badly damaged in that smash-up?

A. Not by the bone.

Q. What was it damaged by?

A. Just the contusion, blow.

Q. Why not by the sharp ends of those bones?

A. No evidence of the lung having been pierced.

Q. What would be the evidence of it?

A. That would be a very different condition from what there was there at the time he was injured.

Q. What would be the difference, give us some idea?

A. There would be air escaping into the pleura and there would be a lot of coughing up of blood and probably pneumonia.

Q. Well, he did cough up blood, didn't he?

A. Blood mixed with sputum.

Q. We will assume it to be true, that while he was under the [fol. 289] bridge a large clot of blood he picked off his chin; he said it was spongy and about the size of a hen's egg, where did that come from, in your judgment?

A. I don't know.

Q. Well, you know about this injury; where, as a physician and surgeon, would you say it came from?

A. I wasn't there. It was just his word. It may have been a nose-bleed or may have been from some other part; might have been from his stomach; may have been from his lung.

Q. It could come from his lung, couldn't it?

A. Yes.

Q. And if it did it would indicate a very extensive injury of the lung, wouldn't it?

A. Not necessarily.

Q. Would not mean much to you, would it?

A. Well, it would be very indefinite.

Q. You did not find anything wrong with the heart at that time, did you?

A. No, sir.

Q. Nor yesterday?

A. No, sir.

Q. Good, sound pumping machine, isn't it?

A. Yes, sir.

Q. Nothing impeding it?

A. No, sir.

Q. Nothing wrong with the lungs at the present time except the decreased area?

A. There is a decreased area and there may be some scar tissue on the lung.

Q. But where he has the scar tissue that part of the lung, small [fol. 290] or great, is not of any use to him, is it?

A. Yes, sir.

Q. But if he did have scar tissue and say a third of his lung that was useless, that would not make any difference, would it?

A. Yes, it might make some difference in his breathing capacity.

Q. Didn't you say that the right lung would take up that job and perform that work in place of the destroyed lung?

A. Yes, it could.

Q. And if the left lung there was entirely destroyed the right lung will take up the job and get along beautifully, will it not?

A. Not if it was entirely destroyed.

Q. Well, half of it?

A. It could care for half of it very nicely, I think.

Q. Wouldn't have any shortness of breath?

A. Might have a little.

Q. It would take quite a lot of exertion to bring it about?

A. I think considerable; especially the left lung.

Q. And the heart hasn't enlarged?

A. No, there is no evidence of any enlargement of the heart.

Q. If it is enlarged in the way that has been testified to here it is a very serious matter, isn't it?

[fol. 291] A. If it is enlarged to the extent that has been testified to, I would consider it a rather serious thing.

Q. If enlarged because of the reasons given by Dr. Drechsler, the testimony you heard, that would mean that this man has a very serious condition in his chest wall?

A. Well, I would think it would be very serious if it was anything like what Dr. Drechsler testified to.

Q. And he would then, if he exerted himself have very marked shortness of breath, under the circumstances?

A. Not necessarily.

Q. It is hard to breath if your heart is working too hard, isn't it?

A. Well, the heart being enlarged would not necessarily mean it was working too hard.

Q. The testimony was that the heart enlarged because of the extra work the heart had to do; now, while that work is going on

and the man is attempting to exert himself, wouldn't his breath be short?

A. I presume so.

Q. And wouldn't it be hard for him to exert himself in the way of manual labor under those conditions?

A. Under those conditions stated, I presume it would.

Q. As a matter of fact, if such conditions exist the plaintiff would not be of very much use as a working man, would he?

Mr. Palmer: Just a moment, please.

Mr. Anderson: All right, I withdraw it. I do not suppose it is [fol. 292] strictly cross examination. You did not go into that.

Mr. Palmer: Well, it seems to me, too, that you cannot ask him to assume—

The Court: The question is withdrawn, as I understand.

Q. On the Defendant's Exhibit 12, I notice a shadow extending from between the fifth and sixth rib, close to the sternum and extending down rather dimly to the ninth rib, you tell me that is the outline of the heart, don't you?

A. Yes.

Q. Where is the heart located with reference to the ribs?

A. Well, between the third and second rib down to between the fifth and sixth, something like that.

Q. And this picture is taken directly at right angles through the body, isn't it?

A. Yes, sir.

Q. Then how does it show the shadow of the heart down below the ninth rib?

A. I am talking now as you view the heart from the front and the ends of the rib as they join the spine in the back are much higher up than they are in front. So it would give a different location entirely if you are talking from the back. That is a different thing.

Q. Take it from the back, between what ribs is the heart?

A. I would not be so clear on that because we never measure a thing that way, but it shows a great deal lower down in the back [fol. 293] than in front on account of the different location of the ribs. Those ribs extend higher up in the back, different curve to them entirely.

Q. Doctor, having in mind that you do not find anything wrong with the heart and nothing materially wrong with the lung, will you tell us if you have any opinion in the matter why it is, assuming it to be true, that the plaintiff is having these difficulties he has testified to about his breathing and his heart and his pains in there when he exerts himself, what causes all that?

A. I cannot account for it in any way.

Q. Don't believe he has them, do you?

A. He may have. I would hate like everything to distrust him, but I cannot account for it.

Q. Well, if he has them, can't you account for it then?

A. No, there isn't any condition from my physical examination that would justify any conclusion; there is nothing to justify me in saying that there is anything wrong.

Q. I say it would be accounted for, in your judgment, if the conditions were, in fact, as testified to by the physicians for the plaintiff?

A. Yes, I think so, to some extent.

Q. Well, to what extent?

A. Well, for instance, we take Dr. Drechsler's testimony that this man is apt to die at the slightest exertion——

Q. No, no, he didn't say on the slightest exertion; don't misunderstand Dr. Drechsler; he didn't say he would die if he happened to walk across the room.

A. Wasn't it to that effect?

Q. No, the testimony was that if he was subjected to some sudden violent exertion?

Mr. Palmer: Sudden exertion.

Mr. Anderson: Sudden exertion and violent also.

Mr. Palmer: That he would drop dead.

Mr. Anderson: Strain on the heart, but that is not what I am talking about. I am talking about the conditions that have been testified to by the plaintiff, what he feels and how he is affected, would those conditions be accounted for by the doctor's testimony as to the conditions they found there?

Mr. Palmer: Just a moment. I am constrained, if your Honor please, to object to that as not cross examination and asking this physician to assume the truth of the testimony of the other physicians as to conditions which were the contrary of his own findings.

Mr. Anderson: Well, I am cross examining this doctor. It is certainly proper cross examination.

The Court: The question is that he assume the testimony of the other physicians to be true?

Mr. Palmer: Yes.

The Court: What his opinion would be. I think that is proper cross examination.

Mr. Palmer: That is, assuming the conditions testified to by the other physicians, the contrary of his own findings, to be true?

[fol. 295] The Court: Yes.

Mr. Palmer: Then what is his opinion?

The Court: Yes.

Mr. Anderson: Whether it would account for what the plaintiff complains of.

The Court: I think that is proper cross examination. Objection overruled.

(Defendant excepted.)

Q. If the conditions that the doctors for the plaintiff have testified to as existing in that region, wouldn't that, if those conditions actually existed, account for these troubles that the plaintiff has complained of?

Mr. Palmer: Now, that is certainly objected to.

The Court: Objection overruled.

Mr. Palmer: As not cross examination, no foundation laid, contrary to the witness' findings and argumentative.

The Court: Objection overruled. You may answer.  
(Defendant excepted.)

A. Well, it might account for some of them.

Q. Of course, it would be accounted for if he had tuberculosis and things of that sort?

Mr. Palmer: Now, that is objected to as assuming something not established by any testimony in the case.

Mr. Anderson: Well, he said it might and I simply want to chase it down and see if we can get somewhere.

Q. He hasn't got tuberculosis, has he, Doctor?

A. There is no evidence of if that I can see.

[fol. 296] Q. Has he any disease there that you could find in any way, shape or manner?

A. Nothing that I can find except a limitation in the capacity of the left chest.

Q. And that you don't think amounts to anything?

A. In addition to that, there is probably some adhesions, the result of his having injured the pleura when the bones were broken; might make it a little painful for him to breathe. There are some broken bones in the chest which are sometimes influenced by climatic conditions, might cause him some pain sometimes. There is a little limitation in the lung capacity on the left side. Outside of that I cannot account for—

Q. Well, speaking of pain, what became of the intercostal nerve on each one of these broken ribs?

A. It has evidently been regenerated, if it was destroyed.

Q. The intercostal nerve is the nerve that feeds each rib, runs along underneath each rib, isn't it?

A. Yes, sir.

Q. When you are taking X-rays such as Defendant's Exhibit 12, Defendant's Exhibit 4 and so forth, do you regulate your exposure according to the object you want to disclose?

A. Well, I am not very conversant with the taking of pictures. Although I have a great many pictures taken for me, I don't know or understand the mechanism very well.

Q. If you want to take a picture of a calloused condition of the [fol. 297] the lung, you make a very short exposure, do you not?

A. I don't understand about that.

Re-direct examination.

By Mr. Palmer:

Q. With reference, Doctor, to these Exhibits, 6, 4, 5 and 7, is there a method by which the perspective or third dimension can be seen?

A. Yes, sir. It is with the use of that appliance that you have them in there, stereoscope.

Q. Does that assist and aid in the view of this sacroiliac joint?

A. Yes, sir.

Q. In what way?

A. It shows you the entire pelvis, the outline, the contour of it.

Q. And does it show you the third dimension so you look back?

A. Yes, sir.

Q. You not only see the breadth and length, but you see the thickness through?

A. Yes, sir.

Q. Have you examined Defendant's Exhibits 4 and 5, these pelvic pictures, by means of the stereoscope?

A. Yes, sir.

Q. And do you base the opinion that you have given here as to the condition of the pelvis upon that view that you have taken, partly?

A. Partly.

Q. Have you examined also the chest pictures, Exhibits 6 and 7? [fol. 298] A. Yes, sir.

Q. In the stereoscope?

A. Yes, sir.

Q. And what does that give you?

A. Gives a better idea.

Q. Doctor, by looking in the stereoscope at these two pictures, 6 and 7, of the chest, can you tell whether there is fibrous material or scar tissue in the lung?

A. Yes, sir.

Q. And do you find any?

A. Yes, in the region of the scar, as testified to here before, is a slight amount; that is, it looks as though it might be scar tissue.

Q. Is that of the lung tissue itself?

A. The lung tissue and I presume the pleura.

Q. What is the pleura?

A. It is the covering of the lung in the chest wall.

Q. Is there anything like one-third of that?

A. No, sir.

Q. Or one-half of the lung?

A. No, sir.

Q. Is it sufficient so you can speak of it in percentages?

A. I don't believe so.

Q. Is it enough to make any material impairment in the breathing capacity of this man?

A. I don't believe so.

Q. Is it enough to make any material difference in the work of the heart?

A. No, sir.

[fol. 299] Q. Since counsel has gone into it, I want to ask you for your best judgment and opinion as to this man's ability at the present time, Doctor, to work?

A. I don't believe that at the present time he would find it very

easy to work, but I believe that it would not take him very long to be in very good condition to work.

Q. If he should go to work, is that what you mean?

A. Yes, sir.

Q. And in your best judgment and opinion, if he should go to work, would he eventually regain his full ability to work?

A. I believe so.

Q. Counsel has assumed that there was a strain of the sacroiliac joint or ligaments instead of a subluxation or separation, what would you say as to the prospect of improvement under those circumstances?

A. Very good.

Q. Whether or not he would eventually recover?

A. Yes, I think he would.

Q. The bruising or injury to the ulnar nerve of the left arm of which you have spoken, do you find a better or a worse condition than you found at the examination in September, 1921?

A. The condition that was involved by the injury of the ulnar nerve asserted itself in the hand more especially than anywhere else.

Q. Yes.

A. And particularly the little finger, and that is materially im-  
[fol. 300] proved as far as the atrophy of the muscles are concerned.

Q. Yes. And, in your judgment and opinion, will that continue to improve?

A. Well, if there is any difficulty there at the present time, I don't imagine that it is going to improve much unless exercise will do it. It is very trifling at the present time.

Q. Did you take the height of this man?

A. Not at this time.

Recross-examination.

By Mr. Anderson:

Q. What do you call that instrument, stereoscope?

A. Yes, sir.

Q. And when you use that you are looking at X-ray pictures that have already been taken?

A. Yes, sir.

Q. And can you see anything more than the X-ray pictures as developed disclose?

A. Yes, it gives a much better outline because of the so-called third dimension.

Q. In other words, if the X-ray picture is taken in such a manner as not to show the scar tissue in the lung, then you can't see it through the stereoscope, can you?

A. If there is any of it shows there at all, it can. You can elicit the extent to better advantage.

Q. If there is fibrous callous of the lung showing in the X-ray picture you can see it more plainly in the stereoscope?

A. Yes, sir.

[fol. 301] Q. But you cannot see any more in area, can you?

A. No, not in area, probably.

Redirect examination.

By Mr. Palmer:

Q. Are these pictures taken in such a way that it would show if it was there?

A. Yes, sir.

Mr. Anderson: This witness has already testified that he doesn't know about the exposures and things of that sort.

Mr. Palmer:

Q. What about that?

A. I know a good picture and a fair picture and how to read it, but the taking of the picture is another thing.

Q. But these chest pictures here, especially looking at them through the stereoscope, 6 and 7, if there were any extent of scar tissue in the lung there, would it show?

A. Yes, sir.

Q. Are they taken in such a way that it is designed to show it?

A. Yes, sir.

Q. Well, then, what counsel means is that if it is there you can see it and if it is not there you couldn't see it?

A. That is the way I understand him.

Recross-examination.

By Mr. Anderson:

Q. Suppose you were going to have an X-ray picture taken for [fol. 302] the purpose of showing the existence or the non-existence of a callous of the lung, how long would you make the exposure to bring that out on the X-ray picture, if you know?

A. I would not know exactly.

Q. Do you know whether you would expose the picture shorter or longer where you wished to expose a calloused condition of the lung than where you wished to expose the outline of the heart?

A. I don't know.

Mr. Anderson: That is all.

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Dr. ARTHUR S. HAMILTON, called on behalf of defendant, duly sworn, testified as follows:

Direct examination.

By Mr. Palmer:

Q. Your full name is Arthur S. Hamilton?

A. Yes, sir.

Q. Where do you live, Doctor?

A. Minneapolis.

Q. How long have you lived there?

A. Since 1904.

Q. How old are you?

A. Fifty years old.

Q. What is your business?

A. Physician.

Q. How long have you been a physician?

A. Since 1897.

Q. What are your qualifications?

A. I am a graduate of the medical school University of Pennsylvania and I have been doing more or less work ever since. I have [fol. 303] been back to Pennsylvania twice, to Harvard once, been abroad once and been teaching medicine in the University of Minnesota since 1904.

Q. And did you do some special work during the war?

A. Yes, sir.

Q. What was that?

A. Well, I was what is called a neurologist. That means looking after the nervous conditions in the aviation service, up to January 6th, 1919, I was detached, something like that, on Long Island. There were a number of flying fields on Long Island and I was neurologist to those fields, and after January 6th or 8th, somewhere like that, 1919, I was sent to what is called the Walter Reed Hospital in Washington and there I was again neurologist to the surgical service. It was not my business to do surgery, but it was my business to look over the people who had injuries of the brain or the spinal cord or the nerves to determine what degree of injury they had and what ought to be done about it, and I served there until sometime in August, 1919.

Q. And what is a neurologist, Doctor?

A. Well, a neurologist is one who deals with what are commonly called nervous conditions, conditions that involve the brain or the spinal cord or the nerves.

Q. How long did you specialize in that?

A. Oh, almost ever since graduation. I served a year as interne [fol. 304] in a general hospital, a post-graduate hospital in Philadelphia. Then I went to live in an insane hospital as physician, and there I was what is called pathologist part of the time; that is, doing post-mortems on the dead bodies, studying their brains and so on. Then I went to the University of Minnesota and began teaching pathology of the nervous system and I have been practicing as a specialist since 1904.

Q. Has your practice been fairly extensive?

A. Ordinarily I have a pretty fair practice, I think.

Q. With reference to consultations with other physicians and so on, do you do some of that?

A. Well, nearly all my business is consultation neurologist. I am neurologist to a number of hospitals in Minneapolis and I suppose I have a good share of the consultations from those hospitals.

Q. Dr. Hamilton, have you made an examination of the plaintiff here?

A. Yes, sir.

Q. When did you make the first one?

A. September 10th, 1921.

Q. And what is this memorandum that you hold in your hand?

A. Those are notes that I made at that time.

Q. Where did you see this man?

A. In my office in Minneapolis.

Q. That would be something pretty nearly a year after his injury?

A. Yes, sir.

[fol. 305] Q. Tell us what you did, Doctor, what you found?

A. He came to my office at that time for an examination and Dr. Sarazin and Dr. Gilmore were both there and we three made the examination. The examination consisted of asking the man some questions as to his age and his occupation and as to his family history, that is, whether there was anything in his family history which in any way predisposed him towards his particular trouble and so far as I could see his family history was good. Then we asked him questions as to his general health, whether he had ever had any serious illnesses or injuries before and what effect they might have on his present trouble and so far as I could see his history was again negative in that respect. He did have an injury of his right leg and right groin, but it was some three years before. That appeared to have healed up. He had had no other serious injury, no operations and he denied sexual diseases and said he had used no liquor of any consequence; smoked considerable. Then we asked him about this particular injury and he stated that on October 27th, 1920, he had this injury. He told the story of his injury and how he was affected and what his condition subsequently was. Then we made a physical examination with the results about as follows:

Q. Just tell us how you made this physical examination, what did you do, Doctor?

A. In making an examination, the proper and accepted way is [fol. 306] to go over a man from top to bottom, without any reference to what may have happened to him, but to find whatever is wrong. You begin by such questions as I have referred to and including the story of the immediate illness that you have in mind at the time, or injury. Then you strip the man and go over him, as I say, from top to bottom, not with any particular respect to what he has or his condition, but to find out everything you can. This man was stripped and the examination made in that way. He walked with a cane and with a limp at that time. He was a well developed, well nourished man and did not look like a man generally ill. His temperature was taken; was 98.6. That is a normal temperature. His pulse was 87. That is somewhat above normal. The average normal pulse is about 72. Of course, under an examination a man's pulse will go up a little bit. Anyhow, 87 is probably a little bit above what it should have been. His blood

pressure, 117 over 82. There are two phases of blood pressure, one when it pumps the hardest and one when it is most relaxed. 117 represents the height of the greatest pump and the 82 represents the lowest phase of the thing. That is a little bit low for a man of his age. The usual rule is something like this. It is 120 for 21 and half a point every year thereafter and he was thirty-three, I think it is; that leaves 12 years which would have been 126. There is a good deal of variation in blood pressure, anyhow, but there is no absolute standard such as there is to temperature, but still that would be a little low. Then I examined his mouth and he had [fol. 307] a moderate degree of pyorrhea. That is an infection around the gums. And his tongue was moderately coated; the right tonsil was considerably enlarged and the left was moderately so. I examined what is called the glands and respiratory system and his heart and blood vessels. He complained of pain over the region below the heart, somewhere in the region of his injury. He said it hurt him on breathing and it was relieved when lying down and when pressure was made over that region he did complain somewhat of pain. Then I made pressure along the spine different points to see if there was any evidence of trouble there. He complained of some tenderness from what is called the 5th thoracic spine. The 5th thoracic spine is a point in the back well below the top of the shoulder blade, pretty near down to the bottom of the shoulder blades, down to the upper part of the small of the back and then in the lower part of the small of the back again he complained of some pain on pressure. And then he complained of pain on pressure over the sacrum, that bone that has been referred to here down in the lower part of the spine, and also over his left sacroiliac joint that has been referred to. Then we applied different tests to determine the presence of any disease in the sacroiliac region. One is to bring the thigh, flex it strongly on the abdomen so as to bring it up towards the body as well as you can and a man with sacroiliac disease is likely under those circumstances to complain of pain in the sacroiliac area. Another method is to reverse the [fol. 308] process, put the man on his belly and raise his leg upward from the table backward and again you get more or less the same phenomena. He complained of pain when that was done in both instances. Then another test is this, to put the hands on these hip bones this way (indicating) and then suddenly to thrust in as hard as you can. Now, the point is that the sacrum is in between these two large iliac bones and like a keystone. Now, obviously if you thrust the two parts together, the lower parts have got to fly out; at least I mean there is a tendency to do that sort of thing and it pinches particularly at about the center. If there is any disease or injury in the sacroiliac region, instead of the man complaining of pain over the point where you put your pressure, as he naturally would, he has the pain in his back. This patient, Mr. Goneau, did not complain of any pain whatever in his sacroiliac joint region on that test.

Then another method of determining just exactly how much distress or physical pain a man actually gets out of an examination is this: If you put your hand on a man's pulse and estimate it, count it, and then you do anything that hurts him distinctly, like sticking a pin sharply in him, or make any kind of an examination you like that hurts, his pulse will always go up as the pain is produced. At the beginning of this man's examination of his sacroiliac region his pulse was 87 and I took it twice in the course of the examination, once about the middle and once more or less towards the end and it was 84. His pulse, therefore, had not gone up; [fol. 309] as a matter of fact it was just three points less than it was at the beginning, which of course is an evidence that he was not suffering any very great physical pain. Then I examined his abdomen. I didn't see anything wrong there. He complained of some pain on pressure at the insertion of the little muscle that lies on the left side here at the inner end of the groin, the pectineal muscle. Then I asked him about various things otherwise in connection with his health. He said his appetite was good for two meals a day. His bowels were regular; said there was no loss of control of his bowels or bladder. He said there was possibly some involuntary urination during sleep at the hospital, but nothing when he was awake. Of course it is only when you are awake that involuntary urination could occur, so he had no involuntary urination. Then I examined the cranial nerves that come out from the brain and supply sight and hearing and feeling and motion to the face, scapula and so on. They were all normal. Then in the course of the statement he had made, he told about some trouble in his left arm and hand and spoke of a numb feeling on the little finger side of his hand. He also stated his feet would go to sleep easily. I examined him for what we call objective disturbances of sensation. What a man complains of we call subjective; what we can get by actual demonstration we call objective. Now, I went over this place where he said he felt numb and his arm where he said there was a tingle, with a wisp of cotton and with the point of [fol. 310] a pin to see whether or not he could feel properly. There was no disturbance of feeling on the upper arm; he could also feel on the striking of cotton in this region, but he said it was different all the time when I stroked the little finger side of the hand and the little finger and certain — of the next finger. He said it was different in that region than it was on the corresponding portion of the other hand when I stroked that, which indicates, of course, that there was something wrong with the ulnar nerve because the ulnar nerve is known to supply the little finger and half of the next finger. Then I examined the muscles of this part of his body; in fact, I examined all his muscles, but these were the only ones affected.

Q. Which ones?

A. The ones I am just going to refer to. The ulnar nerve comes down the arm on this side toward the little finger side and as it gets to the hand it turns squarely across the hand and picks out a certain group of muscles, which are the muscles that enable you to

use your fingers, spread them and bring them together; it also supplies all the muscles that move the little finger outward or raise the fingers. Now, in his hand there was a distinct atrophy at that time of all the muscles of this branch on the little finger side of the hand and of the muscles that lie between the bones on the back of the hand, the ones that move your fingers back and forth. They were not totally atrophied because they could be seen and he could still move his fingers, spread them and bring them together, but there was a distinct little groove along all these points, all of which goes to make up the evidence of some injury to the ulnar nerve. Then the arms were measured at the largest part of the forearm and at the biceps and the measurements were these. The right forearm was five-eighths of an inch larger than the left and the right biceps are three-eighths of an inch larger than the left. Various other examinations were made. For instance, evidences of twitching of the muscles is one sign of nervousness. There was no evidence of that, and then tremor of the muscles, trembling. There was no trembling at the time of the examination. The patient said his arms did tremble very decidedly at times, but it was not so during my examination. He walked with a cane. Then the reflexes were taken. Reflexes are certain responses you get by testing a man in a particular way. For instance, a typical one is this: You tap a man just below the knee pan and his leg flies up like that (indicating), according to how hard you tap it and his condition of health, and there are a number of those around the body, just below the knee pan, just above the heel, at the elbow in front and behind and on the forearm, various places on that. Those reflexes were all taken and were within normal limits. Then there are various reflexes gotten by striking the belly on this side and just like when you are tickled your muscles suddenly draw up. Then there is a reflex gotten by striking the sole of the foot; again it is like tickling. In health a man's toes will go down, just like [fol. 312] you would shut your fist, but in certain conditions your great toe will go up, as if there is an injury to the great toe, it is likely to go up. These reflexes were all within normal limits, no evidence of disease from them. In examining his chest there is evidence, of course, of disturbance on the left side.

Q. At the rear?

A. At the rear and in towards the left side; a slight depression in his chest. There are breath sounds to be heard all over his chest, or were.

Q. At that time?

A. Not as well at that point on the left quite as on the right side, as I remember it now.

Mr. Anderson: Have you got your notes on that?

A. I have got examination of the plaintiff's respiratory system together and I say the respiratory system was not absolutely negative, but you could hear breath sounds through the chest.

Q. What do you mean by negative?

A. Well, negative would be absolutely normal. He had some

fractured ribs and a depression in the chest on that side. To that extent it was not normal. The heart we examined—well, you examine the heart for rate of beat, as to regularity and as to what are called symptoms. Those are abnormal sounds like leaky valves. There was nothing wrong in that respect, except the heart beat somewhat active and beating a little faster than an ordinary heart will. Then examined the heart for area to see if it was in the right place. [fol. 313] So far as I could tell, it was in the right place. I think that closed the examination.

Q. Did you find any enlargement of the heart at all?

A. No, sir.

Q. Any evidences of any such thing?

A. No, sir.

Q. Or any displacement at all?

A. No, sir, I do not recall any such finding.

Q. What is the normal position of the heart with reference to the sternum or breast bone, Doctor?

A. The heart lies a little more to the left side than the right, but still it extends clear over to the sternum, but not much to the right and considerably to the left. If you examine the chest to find the outline of the heart, you begin to get dullness when you are what we call percussing at the third interstice; that is, at the bottom of the third rib; and then dullness continues down to what is called the fifth interstice. That is between the fifth and sixth ribs. And it is pretty hard to locate the apex. The apex is the point or lower portion of the heart. It is pretty hard to locate it by percussion exactly. You usually do it by putting your finger on the man's chest and you can feel it beating under your finger. Now, the point where that beating seems to be the strongest you say is the apex of the heart. In a man whose nipples have not been displaced, it is assumed that if the apex is inside the nipple, it is not too far out. It is normal. The usual position is something like half an [fol. 314] inch inside the nipple, but anything distinctly within the nipple line is called normal in size in that portion and of course the same with a woman except a woman who has borne children and whose breasts are displaced by nursing.

Q. And where did you find this heart with reference to the nipple?

A. The heart was in normal area so far as I could make out.

Q. How could you determine from this examination whether there was any scar tissue in his left lung to any appreciable extent?

A. As the air enters and leaves the lung it makes a noise and there is an instrument known as the stethoscope that you use to listen. It is a common instrument that doctors use to put over the chest and then is attached to the ears and you can hear the sound. Now, that sound is normal or abnormal. There is a certain sound that you could recognize as normal and certain other sounds that you could recognize as abnormal. Then there is a certain thickness of chest wall. For instance, a very fat man has a thicker chest wall than a thin man; you do not hear as well through a fat chest wall as a thin one. You recognize those distinctions. Then

people have inflammation of the surfaces of the lungs. They get thickening of what is called the pleura. You cannot absolutely measure it. You go over the chest with the idea of listening to the sound, see if you can hear them everywhere with the same intensity. Of course, you hear better at some points than you do at other [fol. 315] points. This man's breath sounds could be heard throughout the entire region of the left lung. They were not heard as well on the left side in the region of the injury as they were on the right side. The sound seems further away as if there was something between your instrument and the lung, like as if there is a thickening of the tissue somewhere in between, but the breath sounds were heard everywhere. Then I tried the matter of voice, asking him to speak. When anybody speaks when your instrument is applied to the chest you get a certain sound, normal under certain conditions and different under abnormal. You can hear the sound all right with the instrument on the left side, but it is not heard as plainly as on the other side. Then you determine somewhat by the excursion of the chest, that is, the amount of movement that occurs when a man breathes as to whether his breathing outfit is normal. Then there is the question of the X-rays. You have an X-ray taken of the chest and if they are marked enough it will show certain changes in the lungs. So far as listening to his lungs is concerned the evidence that I could get from that was that there was some thickening in the chest that prevented breath sounds coming through as clearly as they might have, but that was all.

Q. How about destruction of the lung tissue, did you form some conclusion as to that?

A. I couldn't see that, of course, by my examination in my room. I think it is a fair assumption that there was some destruction of [fol. 316] the lung tissue over the region of the injury.

Q. Could you say to what extent or could you form any opinion?

A. I could not form any opinion in that way, because a thickening of the pleura from some inflammation would give exactly the same manifestations as some actual destruction of the lung tissue, unless the destruction of the lung tissue was very great.

Q. Would a severe case of pleurisy give the same?

A. A severe case of pleurisy will give you that sense of sounds being away from you, not hearing so well, as would a thickening of the lung in that region, unless again it was a very extensive thickening. Of course, pleurisy would not give this depression in the chest walls here.

Q. Did you examine the plaintiff again yesterday?

A. Yes, sir.

Q. At Dr. Gilmore's office?

A. Yes, sir.

Q. Will you state just what was done and what conditions you found yesterday; then we will ask you to give your conclusions from that examination.

A. We began by asking the same question about his general condition, how he felt and so on, whether he had improved or had not

improved and this is about the essence of it: He said his left hand and arm were not so strong as they were before, that he had pain [fol. 317] in that region if he used the hand and arm much. He said the numbness was not any worse and was not any better. That is in this ulnar nerve region. He said there was a draw of the left thumb and the first and second finger, so that I think he spoke of handling cards, but anyhow in using his hand the hand would draw down into a cramp and that he would have to rub it and manipulate it and then the cramp would go away. Then I asked him about his leg and the use of it and he said the condition was about the same, but he used this expression, he had gotten so he could handle it better and I asked him if that meant with less pain and he said no, he would not say that, that there was any less pain. He said that walking bothered him in this way, if he went at all fast he got out of breath. He said that was worse than it was when I saw him before, that is, this tendency to get out of breath. He thought he weighed less, but we weighed him later and he weighed 151 pounds.

Q. Did you take his height, Doctor?

A. No, sir, I did not, but I have here somewhere the weight that he estimated, his ordinary weight was 155, he said, at the time of his first examination. I asked him about his appetite and he said he ate two good meals a day and had only coffee for breakfast. He said he slept only fairly well; that unless he got very tired he did not sleep well. Then he referred to spells of dizziness. These came more or less with this difficulty in going fast. He said if he went fast he was likely to get dizzy and short of breath. Then so far as I could [fol. 318] recall that was all that was wrong with him. Then we had him strip in various ways different times. It was a long examination. His pulse was 94.

Q. What should be the normal?

A. 72. Well, I have already said it would probably be a little bit above that because a man is always somewhat nervous from an examination, but of course 94 is above normal. Temperature 98.9. That is practically normal; 98.6 is the ordinary average. His blood pressure was 124 over 84; that would be about normal for his age.

He complained of some pain when deep pressure was made up here in the arm. I looked at his hand and I thought his hand was distinctly better than it was before. I am positive it was. The grooves that I spoke of here before where these somewhat shrunken muscles are, are practically filled up; in fact, I don't think I would notice anything wrong at this time. In fact, Mr. Goneau testified to the fact that those grooves which were there before were gone now and that is my impression, that these muscles that are supplied by this ulnar nerve are practically back to normal size and the same thing is true of those muscles on the little finger side of the hand, they are back to normal in size. I don't think they are quite so firm as they are in the other hand. I measured his hands just below the thumb and the right was an eighth of an inch bigger than the left. It has been said a quarter of an inch here. That is possible because none of these measurements are absolutely accurate. If you get

your tape in the same position exactly they are. Then I examined [fol. 319] his forearm and I did it in this way, so as to get as near as possible to the same point: I took a bony point in the wrist which we know is constant in the two arms and I drew a black line through it at the top on that bone. Then I took a steel tape measure and starting from that I measured up the arm to a certain point, one point about the largest part of the forearm, the next point about the largest part of the biceps and the right forearm is one eighth of an inch greater than the left and the right upper arm is nine sixteenths; that is practically half an inch. The right is a trifle over half an inch larger than the left. I asked him to do various movements with his fingers and he moves his fingers all right in the left hand. I asked him to grip my hand with his two hands, one and then the other, and his grip was not nearly so strong in the left hand as it was in the right. I tried the reflexes in the left arm. They seemed to be the same as they were in the right. I tried sensation and as far as I could tell his responses were about the same. He said it was not the same in the left hand in the region of the ulnar nerve as it was in the right. He, I think, himself called my attention to the fact that the little finger of the left hand was smaller than the corresponding finger in the right hand. That I think is true. I am sure it is true, but it is also true that his left middle finger, for instance, is not as big as his right finger. I don't know that the difference between the middle fingers is quite as great as it is between the little fingers, but it is pretty nearly as great. I also looked for [fol. 320] disease that comes from injured nerves, skin disease and hair growing out in excessive amounts in the injured regions, but so far as I could see the hands looked exactly the same in that respect. I could see no sign of disease in the left side. Then we examined his sacroiliac region and his back. I think the tenderness along the spine was distinctly less as he gave the responses at this time than it was before, but he did say that there was some tenderness at a point in the back about the 6th, 7th and 8th thoracic spines. He said it was a little more tender there than it was along the spine until I got further into the small of the back, when he said again it hurt him in passing over what we call the lower lumbar spine. He was tenderer still over the sacroiliac joint on the left side and out over the left buttocks on the same side and I tried these many ways that I have described here before and others, that of bringing his legs up on his abdomen and of raising his legs up behind and again he said the pain was most marked in the sacroiliac region on the left side, but I tried again this maneuver of squeezing the crests of his ilia just as hard together as I could and he got no pain whatever in his back out of it. I have some measurements of his legs, but anyhow the measurements of his legs and thighs were the same as given by Dr. Sarazin practically. We did the same thing with his legs that we did with his arms, that is, taking a bony point in the leg with the leg straight and trying to find the same point on both sides. That was marked and then we took the steel tape and measured up to a point at the largest part of the calf and [fol. 321] then to different points in the thighs. The calves were

absolutely the same, absolutely. The left thigh was smaller than the right, but it varied somewhat at different locations. One measurement taken well up towards the groin here showed very little difference. They were almost the same. The largest difference occurred at about the center of the thigh, I think it was a trifle over three quarters of an inch in the center of the thigh. And again just a little over above the knee in the lower part of the thigh there was a difference. I do not recall the exact figures. It seems to me it was about half an inch. Then I tried the reflexes in the legs. If there is an injury to your sciatic nerve, for instance, you will see it in this reflex that is gotten by tapping just about the heel. If you tap that the foot goes down. I tapped all his reflexes in his legs and there was no disturbance in his reflexes. Then we spent considerable time in going over the heart. The method of estimating the size of a heart, the ordinary clinical method, is by what we call percussion, as I spoke of a moment ago. You place one finger over the chest at a certain point well above where you know the heart will lie and begin to tap and then you go down, gradually tapping as you go along. Assuming that you are over the lung at some point above the heart, you get a certain note that comes when you tap over any air containing cavity. As you get down towards the heart there is less air because there is the heart instead of the lung; you got a different sound. That is one method you outline the heart that way. [fol. 322] I was unable to make out any enlargement of the heart by that method.

Q. Did you make out any displacement of the heart at all?

A. No, sir. As far as the relation of the heart to the right is concerned, it certainly was not enlarged to the right, to the best of my ability to make out. I would have said it even did not go quite so far to the right as the average heart. Neither by enlargement nor displacement was there any evidence that I could make out of the heart going toward the right. It is a little difficult to determine just exactly where the apex lies because you are running into an area where the lung is becoming more and more prominent and the heart less and less prominent as you go down and the distinction becomes more and more difficult. The apex, therefore, is determined usually more by putting the tips of your fingers over the chest and feeling around until you get the point where it seems to you the heart is beating the most; where you feel the impulse of the heart most strongly that is called the apex beat. In this case the apex beat, as I made it out, is distinctly within the nipple, about a half inch within the nipple.

Q. Is that perfectly normal?

A. Yes, sir, that is perfectly normal so far as its position is concerned. Then I listened also for murmurs, abnormal sounds, produced by leaky valves in the heart. I got no evidence of any murmurs or sounds of that sort. Then the man was put before what is called a fluoroscope plate, which is really a modification of the [fol. 323] X-ray, but instead of getting a picture you simply sit there and look at the man and you can look right through him. He was placed against the X-ray with this fluoroscope plate over his chest

and you can see the heart beating. It gets bigger and smaller with each beat and I don't know that that would give you a very positive idea as to the size. You could tell a large heart from a small heart. You couldn't tell the exact size because it depends on how far away you are from the person how big it seems. By my experience in looking at the patient that was a normal sized heart, but the case was simplified further by a mathematical calculation. There is a method of calculating the size of the heart. It is on such a principle as this: If a ray of light starts out it gradually spreads and of course the angle gets bigger and bigger the further you get away from the thing. If you measure the distance between the X-ray and the heart you can determine exactly the size of the heart. I think Mr. Gilmore has those figures and he will probably produce them here, but the method of mathematical calculation, which I think is very accurate, shows that this man's heart is four and one-tenth inches in its transverse measurement, that is, through the chest, right and left across, and four and one-tenth is a perfectly normal heart for a man of his size, so far as the size of this patient is concerned. Of course hearts differ even in people of the same size; I mean the same people, same weight, put it that way, they are not always the same, they may differ, but as a rule bigger people have bigger hearts than small [fol. 324] people, so there is quite a difference. I would say anywhere from four and perhaps up to five inches would be a normal heart, but certainly four and one-tenth is a normal size.

Q. Could you tell anything about the size up and down, did you take that by this mathematical calculation?

A. Yes. As a matter of fact, I did not calculate that. Dr. Gilmore expects to present that anyhow. So far as I could see its relationship as against transversely, right and left and up and down, seemed to be the same as I saw those plates, but I did not calculate the vertical diameter. Then I tried another test. It consisted in this. I had been examining him for some little time. He was sitting on a table and I took his pulse as a starter, which was 108. Then I asked him to walk fairly rapidly around the room three times, which he did. I then took his pulse again and it was 120. I then had him sit down for two minutes and his pulse was 100. Now, that is a standard method of examination in the federal hospitals for soldiers. If you ask a man where you start off with whatever his pulse appears to be, then you ask him to do something—the regulation in the army is to make a man hop so many times on one foot and then on the other, but it is anything that constitutes physical exertion. Then you take his pulse at the end of that hopping and see where it has gone and of course it always goes up. Then you have him rest and if his pulse goes down to where it was [fol. 325] before or substantially to where it was before, within the limit, say, of two minutes, why you assume that his heart muscle is a perfect muscle because a heart muscle so weak that it cannot stand that physical strain cannot possibly return to normal within two minutes. This man's returned to what the standard was. It started with 108, which is below the average rate of hearts, and comes down to 100, which is below the point at which it started. Then we

devoted again considerable attention to his chest; had some new X-rays taken and they showed the fractures just as they have shown before here, the 5th, 6th, 7th, 8th, 9th and 10th ribs were broken. When you look at his chest from behind just to the left of the shoulder blade on the left side, you can see a distinct depression in his chest, which is evidence that something is wrong and that corresponds to the original where this fracture occurs; there is a depression in his chest at that point. I again listened over his chest and my experience was very much the same as before. There is something in the chest wall itself between you and the air sounds; you do not hear as well on the left side, but you can hear breath sounds everywhere over the left chest that you can over corresponding points on the right. You can hear the spoken voice. You get no rales. The only point is, there is evidently some thickening of tissue between you and that amount of air on the left side that is not present on the right side. Then we did the best we could to estimate whether his chest is actually shrunken by measurement. We did the best [fol. 326] we could to estimate a straight line right down the middle of his front; then we took off the line on the back, the point where the spinous process or vertebrae stick out, and we took a tape line then and went around his chest, right and left, trying to get it at the same level in both places. The greatest difference of all comes at a point where the tape line is, a third of an inch below the nipple. At that point the left chest, measuring from mid-point in front to mid-point behind is an inch and a very small fraction of an inch, twelfth or sixteenth, something like that, practically an inch, smaller on the left side than on the right. As you go down there is practically no difference and as you go a little higher up there is a little difference, but distinctly less than an inch. The maximum point, anyhow, is a point just a third of an inch below the nipple, where it is a trifle less than an inch, less on the left side than on the right.

Q. Could you determine from this listening or auscultation whether there was any substantial amount of scar tissue in the lung?

A. I would not attempt to state percentages, but my belief is based on some such circumstance or finding as this: There is evidently something there that interferes, but it does not interfere enough—you can hear everywhere over the left chest. Therefore, there cannot be any very large amount of lung that is shrunken, nor indeed any very great degree of thickness, because even in people who have had very bad attacks of pleurisy, with a thickening up of the wall, but without interference with the lung necessarily, [fol. 327] you sometimes cannot hear anything in certain regions, so at least it is less than that I know. I could not give any estimate. Over a considerable portion of the left chest breath sounds are just as they are on the right. It is a fair assumption, therefore, that in those parts the lung is doing its duty properly; other parts it is not, but I couldn't say what per cent.

Q. Well, is it anything like a third or a half?

A. Nothing like that whatsoever, no, sir.

Q. Is it sufficient to impair substantially his breathing capacity?

A. I would not say so. Nature provides a man with a good

deal of leeway in his breathing. Most athletes who are especially well trained, for instance, has a capacity for breathing that is far in excess of that of the average man. For instance, in average breathing one uses about 500 CC's. A CC is a measurement of breath. Probably I use what the average man uses, about 500 CC's, but nature gives you 1,600 CC's more.

Q. 2,100?

A. So that you have in reserve a little over three times as much as you would ordinarily use and of course people differ tremendously in the degree to which they make use of that. A woman, for instance, who laces herself very tight, obviously cannot be using the lower part of her chest very much; she is breathing with the upper chest, what is called costal breathing. A man as a rule tends to breathe to a greater proportion at least with the lower chest, diaphragm. But within the limits of ordinary conditions of life people [fol. 328] differ greatly in the amount of lung space they use. Anyhow, you have this 2,100 CC's and the average man is using about 500, so, while of course the loss of any space is the loss of that much space, still nature gives you provision for plenty of leeway.

Q. Would it make any difference with his ability to work?

A. So far as I can make out, there is no evidence of such a disturbance in this man's lung space that would make any difference to him so far as working is concerned.

Q. How about his getting short of breath, anything to cause that?

A. He has what I would call a distinctly nervous heart action at the present time. His heart goes up and down, even in the course of the examination, to a considerable degree.

Q. What makes that?

A. Well, that is the nervous influence of the heart. The heart is under the control of the nervous system. Everybody knows if he is suddenly frightened his heart begins to beat faster and if you are nervous your heart, of course, goes faster and it also varies from time to time; any little thing in the examination will make it go faster; a little exertion, going upstairs, ought to make it go faster. The heart itself is not necessarily wrong, it is the nervous control of the heart that lets it run away with itself. I think this man has a nervous heart, or I will put it this way, he is a nervous man, I would say, a nervous condition and he has this over-activity [fol. 329] of his heart at the present time.

Q. That, you think, is not the trouble with the heart, but with the nerve?

A. That is the trouble with the nerves, not the heart.

Q. This nervous trouble that he has, what do you attribute that to, Doctor?

A. I don't know anything about him naturally, whether he is a nervous man or not. I think he said he was a very healthy man, but he has had a severe injury and he was ill for some time and ever since he has had litigation on hand and a good deal of uncertainty of course as to what that means to him. Everybody recognizes litigation causes nervousness and being the center of so

much attention as he has had, and if anybody told me I was liable to drop dead on any particular exertion, I think that would be inclined to upset my nervous stability a good deal.

Q. Is there anything to that, Doctor?

A. Not in my judgment, no, sir.

Q. But if anybody told you that your heart was out of place would that make you nervous, if you didn't know any different?

A. If they told me it was out of place because of disease, it naturally would make me nervous.

Q. Now, is there any foundation for those statements, in your judgment at all?

A. Not according to any examination I can make.

Q. You were present when this Defendant's Exhibit No. 4, X-ray picture, was taken?

[fol. 330] A. Yes, sir.

Q. You have examined these X-ray plates, have you?

A. If those were the ones taken at Dr. Gilmore's office yesterday, I have examined them all.

Q. These Exhibits 3 and 4 were taken in such manner that they could be viewed stereoscopically?

A. Yes, sir.

Q. Can you see by that means the sacroiliac joint?

A. Yes, sir.

Q. Can you see all of the sacroiliac joint?

A. Yes, sir.

A. Well, you see it all more or less well. You do not see all parts of it equally well. The light penetrates clear through the joint, but you see it better, for instance, at what you think of as the front of it than you do at the back of it.

Q. Could you by this stereoscopic view of this picture of the pelvis see any dislocation or subluxation or displacement of the sacroiliac if it were there?

A. Why yes, if it was a dislocation to such a degree as would be noticeable at all, it would certainly be seen in the X-ray.

Q. And in what manner would it be shown?

A. You would see a displacement of the bone in some way or another.

Q. Do you see on these pictures any displacement whatsoever?

A. No, sir, I saw no displacement whatsoever.

Q. You examined them very carefully?

A. I did, sir.

[fol. 331] Q. And from your examination of these pictures, stereoptically and otherwise, and from your examination of the plaintiff on both of these occasions, has he, in your opinion, any displacement or subluxation or anything of that sort of the sacroiliac joint?

A. No, sir, I don't think so.

Q. Had he had any such thing would these examinations that you have made disclose it?

A. Yes, sir, I think they would.

Q. Something has been said here, Doctor, about a strain of the

ligaments of the sacroiliac joint; could you, from your examinations, form any opinion as to whether there has been any strain there?

A. Nothing like the same accuracy as you can the other question referred to. Of course, a strain is something that you cannot see, cannot feel, cannot tell by X-ray.

Q. What about a strain as to its permanency?

A. A strain is merely a pull on some part of your body; no reason why it should not get well.

Q. Did you discover evidence of a strain of this sacroiliac joint or these sacroiliac ligaments in this man?

A. It is hard to answer that. I am not sure that I did. You have to depend more on what the man says about the thing. I did not find the evidence of it, no, sir.

Q. You did not at either examination?

A. No, sir.

Q. Did you find any evidence of injury to this pectineus muscle at all?

[fol. 332] A. That is very much like the question of strain. He says when I put my hand in here towards the inside of his groin and press that it is painful, but there is nothing that you can find otherwise. You can feel the tendon and the muscle contracting. The muscle is evident there. Of course, you have to rely on his statement. There is no evidence otherwise.

Q. And the sciatic nerve, find any evidence of injury to that?

A. No, sir, I cannot say so. The most material evidence of injury to the sciatic nerve would be some paralysis of motion or sensation in nerves or branches of the sciatic or the loss of this achilles jerk which gets its nerve supply by the sciatic and if the sciatic goes wrong you lose that jerk. He has no paralysis of motion, he has no paralysis of sensation in his legs and his reflex is all right, so I think that constitutes the chief evidence that the sciatic is not injured.

Q. What is this machine?

A. It is an instrument for using the stereoscopic X-ray plates.

Q. And are these Exhibits 4 and 5 X-ray plates taken for use stereoscopically?

A. Yes, sir.

Q. Can a layman by looking into this central portion of this instrument see the pictures in perspective, that is, see the depth as well as the height and breadth?

A. Yes, sir, there is nothing to it except the matter the same as [fol. 333] you would use your vision. You must move the central instrument back and forth until you fuse the numbers or letters that are on the sides. If you push it too far either way you see like two L's or two R's and you simply bring them to the point where they are fused and then you see the picture the same as anybody else does.

Q. To accommodate the particular vision of each person looking at them?

A. Yes, sir, each person must focus that to suit his own vision.

Q. Does that take very much of a change or difference?

A. The best way to do it is to move it until it is actually out of focus, until you can see two L's. Then you bring it gradually back until those L's fuse. Then you have the right point.

Q. And then you can see the third dimension?

A. Yes, sir, you can. You see the depth in the picture then.

Q. Is that of substantial assistance in showing the actual condition of the bones of this pelvic region and particularly the sacroiliac joint?

A. You can see the relationship of things very much better with this dimension of depth.

Q. And the actual condition?

A. Yes, sir.

Q. But it is just like the old fashioned stereoscope?

A. Same principle absolutely. You could not stereoscope two ordinary plates. They must be taken with the idea that they be actually stereoscoped with each other.

[fol. 334] Q. And these are so taken?

A. Yes, sir.

Q. You say that any ordinary layman by looking in there can get this perspective view?

A. Any layman who takes the trouble to get the focus accurately.

Mr. Palmer: Now, with that explanation, your Honor, we ask that the members of the jury severally take the chair here and look at these pictures and get this view of the plaintiff's pelvic region, particularly the sacroiliac joint which appears to be in question here.

The Court: Do you wish me to permit that at this time?

Mr. Palmer: Yes. If your Honor would like to see it first we would suggest that—

The Court: Well, I remember of having done so at the other trial. I remember pretty well.

Mr. Palmer: Did your Honor try it at that time?

The Court: I did. Have you any objection?

Mr. Anderson. The only objection is this: We try a case upon the testimony that appears on the record and that is the same objection I made before. Twelve jurors look into this machine. There is nothing in the record to show what impression is on their mind or not on their mind. There is nothing we can base an argument upon and it is not what I consider the proper way to try a lawsuit. It is not the proper way to present evidence, however, easy it may be to look at it, and I object to it simply on that ground, [fol. 335] that it brings a method of presenting evidence into the case that cannot be entered upon the record. It cannot be made a part of the record. It is impossible to discuss it when you are talking to the jury because they have in their minds what they saw, but there is nothing from which we can tell what they saw. To be perfectly short, it is a wholly impractical method of presenting evidence as to X-ray pictures as to the condition of the human anatomy. We don't know anything about it. It would be a good deal like taking the human body and exposing it to the fluoroscope to look through the body. One juror will look at it and he won't have the remotest idea what the thing is or means; another juror

would have an entirely different idea. I have been practicing law a good many years and dealt with these X-ray pictures and I confess I do not feel I can interpret an X-ray machine. I have to call upon doctors to do it. It seems to me it would be wholly improper and certainly a time taking proposition, to say the least.

Mr. Palmer: Sometime ago I tried a case, your Honor, in which moving pictures of an automobile and a moving car were exhibited to the jury with a motion picture machine.

Mr. Anderson: Yes, but it is made a part of the record.

Mr. Palmer: Then the film itself is put in evidence, put in a little box there as evidence.

Mr. Anderson: You could not look at your film any other way so your film shows up as an exhibit.

The Court: Of course, there is some force to the objection made [fol. 336] by counsel. Frequently in cases we find reference and objection made to testimony that cannot be reproduced or reviewed. At the same time, if this will throw any light upon this case by giving a better idea of these pictures, I do not deem it objectionable.

Mr. Anderson: No, I don't either if it will throw a better light, but will it?

The Court: I don't know.

Mr. Anderson: Your Honor, after we are through here, how are we going to discuss it? How is the Supreme Court going to pass on it after the case gets into the Supreme Court?

The Court: Unless they get the machine.

Mr. Anderson: Well, I am going to raise the point later on. They get the machine and then I suppose the Supreme Court would have to take views and guess upon it as to whether it impressed their minds the way it does a juror. Here we have a doctor who has testified as an expert and I presume we will have the gentleman here who took them to explain what these pictures are and explain how they are interpreted. This witness has already answered and so has Dr. Sarazin that in looking into these stereoscopes you can see the third dimension, the depth, but it is the same picture they are looking at.

The Court: But the apparatus, according to the testimony, gives a better view of the picture.

Mr. Anderson: Of course, in any event, it is inadmissible unless they offer the machine in evidence so that it can be kept and retained [fol. 337] as an exhibit in this case and be used at all stages of this case. I make the further statement that I have not the slightest objection to the court using it so far as this case is concerned excepting it is right on that proposition that it is putting evidence into this case that nobody can tell what it is when it comes to reading the record, nor can they discuss it when talking to the jury.

Mr. Palmer: I might ask the witness a further question, your Honor, for the purpose of laying a foundation.

Q. Dr. Hamilton, are these machines in common use?

Mr. Anderson: Oh, yes, they are in common use.

A. Yes, sir.

Q. And are they all alike, substantially so?

A. Substantially all alike; quite alike as far as I know.

Q. And readily accessible and obtainable in the cities?

A. Yes, sir, wherever they do X-ray work.

Q. Is it a common method of examining X-ray pictures and of making examinations of patients?

A. Yes, sir, I think the stereoscope method of examining plates is in use everywhere and very common.

Q. And is considered a very satisfactory and up-to-date method of making the examination?

A. It is a better method than the first plates.

Mr. Palmer: That is all.

Mr. Anderson: Just let me ask you a question.

Q. When these stereoscope machines are used they are used by [fol. 338] you doctors, you experts, aren't they?

A. Yes, practically all these readings are supposed to be made by those experienced in reading plates.

Q. Don't you consider that a man ought to have considerable experience to use this kind of a machine intelligently so as to arrive at the point of an accurate interpretation of the thing you are looking at?

A. When it comes to interpreting a plate, I think always, whether reading flat plates or stereoscopic plates, requires considerable experience to make an accurate reading of a plate. So far as looking at particular plates, they may be just as accessible to one as another.

Q. But take myself as a layman; I never looked in one of these in my life, do you as a doctor wish to be understood as saying that by looking in there I could get a better and more accurate conception of the condition of that human anatomy than I could by having a man like yourself look into it and then explain to me what is shown by that picture? In other words, where do you get the more accurate description and results?

A. Very naturally anyone experienced in reading plates ought to be better able to give a better opinion as to what the plate shows.

Q. Take an inexperienced person looking at that machine, without any explanation, now really could a layman tell anything about it, in your judgment?

A. He might tell something about it, but I don't think he could [fol. 339] interpret it accurately.

Q. Isn't a layman in looking in there and examining that very apt, in your honest judgment, to get a wrong conception of things?

A. Well, I think a layman looking into that without any advice as to what he sees would simply get a view and would not understand at all, would not know the meaning of the different bones he sees and would not know the meaning of that black spot, possibly, in there.

Q. Take a layman looking in there after you have testified and Dr. Sarazin and probably Dr. Gilmore have testified, do you think a layman would have a better idea of the condition of that human anatomy after looking in there than by listening to the doctors, through your scientific minds, tell us what the conditions are?

A. If you are to take the two separate and alone, I think a layman's view unaided would be of less use to him than the view of someone else given by way of explanation.

Q. In your honest judgment, do you think his view will help him to understand you?

A. Yes, I think so. I assume that looking at the flat plate helps him to understand what one is attempting to say about the pictures and the stereoscopic view is a more satisfactory view, get things clearer.

Mr. Anderson: All right.

Mr. Palmer: It would help to understand the testimony that has been given, Doctor?

A. Well, any view in looking at the plate helps one to understand [fol. 340] stand statements that have been made about the plates; looking into them through the stereoscope gives one a better view of the plate; therefore I should think a better understanding.

The Court: The objection is overruled. I will permit the jury to view the plates through the machine.

(Each of the twelve jurors, in turn, viewed the plates referred to through the stereoscope.)

Mr. Palmer: Will you kindly put in the chest pictures, Exhibits 6 and 7, in such position that they may be seen stereoscopically? You may take the stand, Doctor Hamilton, please. I ask you now about these two chest X-ray pictures, Nos. 6 and 7. What do those show?

A. They show in a general way the lower part of the neck, the chest and the two arching or curvilinear white spots at the bottom are the diaphragm that is enclosed in the bottom of the chest. The white line that runs up through the center represents the sternum or the breast bone and the large blood vessel called the aorta, and that more or less pear shaped thing that runs down towards the diaphragm is the heart and the broken ribs are readily seen on the upper side.

Q. And what are those long branch bones that you see at the top?

A. Those are the clavicles, collar bones.

Q. You have examined these stereoscopically, have you?

A. Yes, sir.

Q. And are they arranged now for a view stereoscopically?

[fol. 341] A. Yes, sir.

Q. And is what testimony you have given with reference to Exhibits 4 and 5 true also of these Exhibits 6 and 7 so far as seeing

them, being a correct representation and assisting in the understanding of the testimony?

A. Yes, sir.

Q. Looking at these stereoscopically, can you see the outline of the heart?

A. Yes, sir.

Q. Do they show any displacement of the heart whatever?

A. I do not believe you could pass a very accurate judgment. An ordinary heart lies more to the left than it does to the right in any chest and that is shown in the picture, but I don't think you could measure it and tell. In a general way, it looks about in an ordinary position and size, but that would not be a very accurate way of determining it.

Q. And from them can you acquire the measurements to which you referred?

A. No, that is done in a different way.

Q. But you saw that done?

A. Yes, sir.

Q. And you did not give us this morning, I think, the other dimension of the heart as measured by this mathematical computation; have you got that since?

A. No, sir. In a general way, the heart looks about the average [fol. 342] shape. I mean if its size is all right, then its proportions must be about right. You can tell that from the appearance on the stereoscope plate and, anyhow, a heart which is enlarged by over-work enlarges in what is called its ventricles; it enlarges laterally, transversely.

Q. And you found that laterally the dimension was correct?

A. Four and one-tenth inches.

Q. Is that correct?

A. That is correct.

Q. And normal for a man of his size?

A. Anywhere within that would be normal and that is well within normal limits; I mean within that immediate neighborhood would be normal.

Q. Does this picture show whether or not there was any material amount of scar tissue in the lung?

A. It gives one some idea on that subject, yes, sir.

Q. And does it show any material amount?

A. I don't think you could tell whether it was in the lung itself or whether it was merely in the chest wall outside the lung. Something obstructs the light in going through that. The bone obstructs it very much more so, but there is enough here of thickening of tissue in some way that it obstructs the light a little more than it does right here (indicating). You assume, therefore, that there is some scar tissue, but whether that scar tissue is in the lung or is in the wall of the chest just outside the lung is something we have trouble in telling.

(Each of the twelve jurors thereupon, in turn, viewed the ex-[fol. 343] hibits referred to through the stereoscope.)

Q. I want to ask you, Doctor, in general your opinion about this man's condition as to whether he is able to work?

A. I hardly think so. Certainly not heavy labor.

Q. Why?

A. I think his nervous condition would be the chief objection. His heart beats rapidly at any particular exertion he undertakes. He is not fit for heavy labor just now.

Q. What is the cause of that?

A. That is a nervous condition so far as his heart is concerned.

Q. What is the cause of the nervous condition?

A. I know that the tendency of a matter such as this suit is a condition likely to make a man decidedly nervous. I know he has been examined a number of times by different people and that isn't very good for a man. I know he has heard some unfavorable things said about his heart and his health which would be likely to make anybody nervous and I know he has been through a pretty severe accident.

Q. What is your idea as to the future?

A. I see no reason why he should not get well.

Q. And be able to work?

A. Yes, sir.

Q. As well as before?

A. Why, substantially, yes, as far as I can see.

[fol. 344] Cross-examination.

By Mr. Anderson:

Q. You testified in this action before on behalf of the railroad company?

A. Yes, sir.

Q. You testify very frequently, do you not, in personal injury actions against the railroads and other corporations?

A. Why, I don't think so. This is the first time I have testified for the Soo since I was here. What was it, a year and a half ago, something like that. I do, yes, appear occasionally. Not so very frequently.

Q. You remember testifying in a good many cases where I have represented the plaintiff?

A. Yes, sir, I met you a number of times.

Q. It doesn't happen that you are testifying only in cases I am interested in?

A. No.

Q. You are not employed regularly by a railroad company?

A. No, sir.

Q. Generally speaking, you confine your work and have for about twenty years, to nervous trouble?

A. Nervous and mental diseases.

Q. I suppose mental disease is a branch of nervous trouble, isn't it?

A. They are often spoken of separately. Of course, they all involve the nervous system.

Q. This man is troubled with his left hand in the fingers and parts that you referred to?

[fol. 345] A. Yes, sir, he had and still has some.

Q. That originates with an injury to the ulnar nerve?

A. Yes, sir.

Q. The ulnar nerve has nothing to do with the supplying of the arm proper, has it?

A. Yes, with the forearm. It runs down the upper arm inside but it doesn't leave any branches until it gets to the elbow. It sends a few into the joint. Then it begins to supply muscles in the forearm and in the hand and this skin supply that has been spoken of.

Q. But not the upper part of the arm?

A. Yes, sir.

Q. The upper part of the arm you found how much smaller than the right?

A. Nine-sixteenths of an inch.

Q. And the lower part of the arm?

A. The right forearm was one-eighth inch larger than the left.

Q. So that the shrinking in the upper arm is four and a half times as great as in the lower arm?

A. Yes, sir.

Q. Why?

A. Well, I don't know. In the first place, the man is a right-handed man and his right upper arm would naturally be a little bit larger than his left and I suppose the rest of it is disuse.

Q. If there is or before this accident a difference in the size of his two upper arms, it would necessarily be slight, wouldn't it?

A. No, there is more difference usually in the arms than there is [fol. 346] in the legs in respect to the two sides. It depends so much on a man's individual activities; then it also depends on this: Some men are much more right-handed than others; I mean one man is so handy with each arm that he does things with either.

Q. Take a man where he is engaged in active work and his right arm develops more fully than the left, the forearm develops too, doesn't it?

A. Yes, sir.

Q. And there is the same relative difference in the size of the forearm in the right arm as in the left in the normal conditions like that?

A. In a general way, yes; I think there is some difference. All measurements taken in the upper arm are taken around what is called the biceps and the biceps is a peculiar, rather short, bunchy muscle and if it enlarges much under use it gets to stick up pretty well, whereas the muscles in the forearm are all of the usual, stringy type, long drawn out.

Q. Yes, granted, but you have measured lots of arms on normal people in the course of your professional practice?

A. I don't know that I have measured many normal. Examinations, of course, are usually made on somebody that is supposed to be abnormal.

Q. Forgetting this accident and taking this man Goneau, rail

road man, nothing happened to his arm at all, wouldn't you expect to find that if the right arm around the biceps was perceptibly larger [fol. 347] than the left arm the right forearm would be larger?

A. Well, I don't know as I can answer. Perhaps on general principles it might be, but I am not sure it would.

Q. But in this particular case his right upper arm is nine-sixteenths of an inch larger than his left, and the right forearm is only one-eighth of an inch larger than the left?

A. Yes, sir.

Q. And the forearm of the left hand is supplied in part by branches of the injured ulnar nerve?

A. Yes, sir.

Q. And the upper arm is not supplied at all by any branches of that nerve?

A. That is correct.

Q. And there are no other nerves that you found hurt about this man's left arm?

A. He spoke of some tingling sometimes on the inside of the upper arm and lower arm both, but on my examination I could not find any evidence of any injury to a nerve.

Q. Then, unless it should happen that this man had an upper arm on the left side considerably smaller than the upper arm on the rights, you cannot account for that nine-sixteenths of an inch, can you?

A. Well, it is a fact that exists; that is all there is to say about it.

Q. Cannot attribute the difference, then, to this accident and the result of this accident?

A. If it had been the other way around, if the forearm were the smaller part as against the upper, then it might have been perfectly [fol. 348] rational because the ulnar nerve does supply the muscles in the forearm. I know the ulnar nerve was hurt. Now, if the atrophy or shrinkage had been in the forearm it would be proof of it, but, as a matter of fact, there isn't any evidence that I recall in the trial at any point indicating any injury to any nerve supplying the upper arm that directly connects it with the injury.

Q. Is it due to non-use?

A. That is the only explanation I could give.

Q. If it is due to non-use, why didn't the lower arm shrink as well as the upper arm?

A. I cannot give you any answer, except the one I gave that the measurements are always at about the center of the upper arm which is the center of the biceps muscle which is noticeably a muscle that begins to get big when you get your muscles well developed, and so on, so I suppose that a muscle rounded as that one is would probably show greater differences in measuring the circumference of an arm than would these longer shoe-string muscles of the forearm.

Q. But when you measured the upper arm in connection with this patient you measured the upper arm when it is relaxed, didn't you?

A. Yes, but a well developed biceps stands up more whether it is contracted or not.

Q. Has he a well developed biceps?

A. He is just a fairly muscular man. No, I would not say particularly well.

Q. Were the biceps on his right arm any harder and firmer than on the left arm yesterday?

[fol. 349] A. Well, I went over all the muscles of the arms with the idea of trying to determine what we call tone, whether one was firmer. I think the muscles of the right are a little firmer than the left.

Q. Are you sure of it?

A. No, I am not so very sure, but that is my opinion. There isn't very much difference, but I think there is a little more slackness in the left arm.

Q. If there had been non-use of the left arm and active use of the right arm you could tell the difference in the tone very quickly?

A. Depends on the difference in the tone and the size of both.

Q. If there had been non-use of the left arm so as to cause a reduction of nine-sixteenths you could tell, couldn't you, from the tone that non-use had caused the difference in this size of the two upper arms?

A. No, I don't think that you could.

Q. When you have non-use what becomes of the tone of the muscle?

A. If you mean by non-use absolutely no use at all, of course a muscle shrinks away and gets flabby rather rapidly if you do not do a thing with it, but absolute non-use never occurs except in a muscle that is absolutely paralyzed.

Q. This witness has testified that he has done no work now since October, 1920; then what would there be that would keep the right arm developed and the left arm not, the upper arm, if that is the fact?

[fol. 350] A. Well, they are both developed. It is a mere matter of degree of development.

Q. If he hasn't done any manual labor for over two years, why should the left arm shrink from non-use and the right arm be five-eighths of an inch larger?

A. A man works his muscles all the time unless he is paralyzed. You cannot eat your meals unless you use your muscles.

Q. Would that keep up the tone and the size?

A. Not anything like as well as hard work will.

Q. Is it your idea that in eating his meals he would use his right arm more than the left?

A. I suppose he must have for some purpose used it more than the other.

Q. Take the leg on the same subject; how much larger is the right leg than the left around the thigh?

A. At the point of greatest difference about the middle of the thigh, the difference was three quarters of an inch.

Q. I notice the physicians testifying for the plaintiff said an inch; you cannot be absolutely accurate even on that measurement, can you?

A. Well, I made the measurements and Dr. Sarazin put them on a piece of paper and I gave the measurements this morning, I suppose, from the record.

Q. Three-quarters of an inch ordinarily cannot be accounted for by non-use, can it, in a case where a man has been walking, as the testimony shows, for two years and has not been working?

[fol. 351] A. I should think there would be no difficulty in accounting for it in that way.

Q. He uses both legs, don't he, when he walks, under the testimony here?

A. I suppose he does.

Q. Then if he walks on his left leg he uses it?

A. Yes, sir.

Q. Been using it according to his testimony for two years. Now, so far as retaining and keeping the size of a leg do you have to use it continuously and strenuously?

A. I don't say you have to use it strenuously, but anybody who ever discontinues the use of a limb gets a more or less rapid atrophy, according to the completeness of the disuse. If you put an arm, for instance, up in a splint where it cannot be used at all, the arm is not paralyzed, but it lays in a splint where it cannot be used so very readily and shrinks.

Q. But I am speaking about two legs being used by a man, he cannot walk, never has walked unless he used both legs, why would one shrink more than another?

A. I think he has testified he limps with one leg and he used a cane up to June, 1922.

Q. Suppose he used a cane up to June, 1922, and then he had been fully recovered and threw aside his cane and had been walking normally since, wouldn't the leg that had been small regain its tone and size long before February, 1923?

A. I should think he probably would have.

Q. As a matter of fact, there isn't an injury in this case so far as [fol. 352] you have discovered yet that has anything to do with nerves except the ulnar nerve?

A. The whole thing has much to do with his present nervousness. And I have testified to the ulnar, but of course, it has been brought out about these broken ribs. Naturally, that interferes with the nerves in that part.

Q. There is something wrong with his leg now, isn't there?

A. I could not necessarily say so. I don't know why one of them should be smaller than another. Of course it may have been always so.

Q. When I say leg I mean also to include the sacroiliac joint because that is what we are talking about; I mean there is something wrong with this man's left anatomy in the sacroiliac joint or around there that causes him to have trouble in walking, isn't there?

A. He says it causes pain.

Q. What do you think about it?

A. I cannot be sure about the pain. I have no positive evidence that he has and I cannot find the physical findings that would ex-

plain his trouble, but a man can have a lame back without finding any physical evidence of it.

Q. If he was injured to the extent of badly straining the sacroiliac joint without breaking it apart, he would be a very lame man after that accident, wouldn't he?

A. He would be for a time, yes, sir.

Q. How much of a time?

A. Depend entirely on the severity of the original strain and on [fol. 353] other factors in life that are often difficult to tell. Any injury naturally tends to heal up, but there are certain things in life such as infections in the body that in some way prevent the full healing of parts that are injured.

Q. Has he got any infections?

A. He had some pyorrhea and he had some tonsils that have been affected.

Q. Do the tonsils and the pyorrhea have anything to do with his lame limb, any connection between the two?

A. As I understand it, speaking of his lameness refers to his sacroiliac region.

Q. He says he is lame; do you think he is?

A. He walks with a limp part of the time and part of the time his limp is certainly very slight.

Q. When have you seen him part of the time when the limp is very slight?

A. I asked him yesterday to walk around Dr. Gilmore's office three times, which he did for me.

Q. Was that after Dr. Gilmore had handled him a while?

A. No, sir, that was I think at our second trip.

Q. That is when he walked fast?

A. Yes, sir.

Q. Was Doctor Gilmore there?

A. I don't think he was.

Q. He did not walk with much of a limp then?

A. No, sir. And I noticed him on other occasions.

Q. Do you want to be understood as saying this man is pretending that he is lame?

[fol. 354] A. No, I would not say that. It is a well known fact that if a man has a certain soreness in his back he may walk with one limp at one time and not at another.

Q. You mean within a few minutes of each other in time?

A. Yes, sir, often. All depends on the severity.

Q. He could have suffered injury to the sacroiliac joint in October, 1920, and have a real limp from that to today and you, by your examination, could not find anything wrong with the joint, isn't that true?

A. I think it is extremely unlikely. I doubt if it is true at all.

Q. A real injury to the sacroiliac joint is a serious matter, isn't it?

A. It is a more or less serious matter, yes.

Q. And you do not have to tear it apart, do you, to cripple a man for life?

A. I have seen sacroiliac joints torn apart, as far as that is con-

cerned, and the man get over it. You do not have to tear it apart so that you can visibly see that it is actually torn apart in order to have a severe injury to it.

Q. If a sacroiliac joint is injured to such an extent that you, by an X-ray picture, can see the separation, do you mean to say such a man as that is likely to ever be able to walk much?

A. Why, sure. I have seen it happen.

Q. You are talking of the exception now, aren't you, not the rule?

A. I have seen very few sacroiliac joints actually torn open. Con-[fol. 355] sequently, there are not many exceptions to it. I recall three now anyhow.

Q. Have you had experience with sacroiliac joint injuries where the man remained a cripple, lame?

A. I remember two women that I have seen. I don't know whether there were any men or not.

Q. Where a man is thirty-one years of age at the time of the accident, the union between the parts at this joint is somewhat bony, isn't it?

A. Yes, sir.

Q. As a matter of fact, immovable, isn't it?

A. It is very slightly movable.

Q. Under what conditions could you make any motion? You could not do it by any manipulation on your part, could you?

A. You could if you could get hold of the bones properly or if the man would submit to that kind of manipulation; you could move them very slightly.

Q. And if there is a separation so it can be seen by an X-ray machine you would have to break the bony substance, wouldn't you?

A. Yes, and particularly have to tear a number of the ligaments.

Q. The ligaments are outside of the so-called bony substance?

A. Yes, sir.

Q. The bony substance between the parts, aren't they?

A. There are little bony projections like a dovetail, kind of short things, but there are many of them.

[fol. 356] Q. Take the surface of the fresh bone, it would not show those protuberances to the naked eye very prominently, would it?

A. Yes, they are big enough for that. Big as ordinary shot.

Q. Why is it that when you take a picture of the sacroiliac joint and then look at it through this stereoscope, there is an apparent dark separation, the same as in the hip joint, only smaller?

A. Always between the actual bony part there lies a fleshy substance, periosteum, and in the joint itself cartilage.

Q. On this joint?

A. Yes, and that permits the passage of light more readily than does the bone. Therefore, at the point where the light goes through you get the appearance of darkness.

Q. What is there between these two bones in a child?

A. The same thing, only the bony development gets harder as you get older. There is periosteum that covers the bone all around and where two bones meet together in a joint there is another substance called cartilage, a little different from periosteum.

Q. Is that in here between two bones?

A. Yes, sir. Not as much as there is in some other joints.

Q. What is it that hardens into bony substance when you become a man growing older, in that joint?

A. There are certain joints from which bones grow and they are [fol. 357] distributed even through the shaft of the bone and at a certain stage in your life, even after you have attained fair size as a child, if you boil out the fleshy substance the bones fall apart. Now, that substance gradually undergoes this calcification, becomes harder and harder, and the bones, therefore, become more and more like true bony substance.

Q. These two bones as you grow older practically unite and become solid, don't they? Take a man my age—

A. No, I would not say that. Take, for instance, those little projections, we will say, on the surface of the bone where the two sides fit together. Of course, where there is articulation on one side there has got to be a little scooped out place on the other. Those become firmer and firmer as you grow older.

Q. Firmer as to each other?

A. No, sir, as to their individual firmness.

Q. In looking into this stereoscope at the pelvic region, can you tell anything about a previous injury to the sacroiliac joint unless the injury was so extensive—I am assuming now, of course, that there is no fracture that now, two and a half years after the accident, they would still be separated?

A. I would not use just the word separated, but unless there was some displacement I do not see how you can tell by that X-ray.

Q. By displacement you do not mean separated, but up or down or sideways?

A. Yes, might be separated, torn away from each other or displaced upward, backward and forward and so forth.

[fol. 358] Q. Suppose they were simply separated laterally would an X-ray show it?

A. Yes, if the space between them was increased in size you would recognize that.

Q. Is the normal space always exactly the same in every human person?

A. No, I don't suppose it is exactly.

Q. Then a separation such as I am speaking of would have to be very slight if the man was going to continue able to walk.

A. Could not be very marked, no, sir.

Q. It has to be marked for a layman to know the difference in looking into that machine, isn't that true?

A. It would be for a medical man also.

Q. When we are speaking about an injury to the sacroiliac joint known as a stretching or straining we are referring then to the ligaments, aren't we, principally, that bind them together?

A. Yes, sir, I presume so.

Q. And is there any difference in principle between a severe sprain of the sacroiliac joint and of the ankle, as to what takes place I mean?

A. Oh, yes, because the ankle is a movable joint and a strain of a given degree of severity would much more likely produce definite changes in the joint in the ankle than it would in the sacroiliac.

Q. When you have a severely sprained ankle, have you simply got a stretching proposition or haven't you got a tearing proposition?

A. Depends altogether on the severity of it. A small one merely [fol. 359] means a stretching; a more severe one a tearing or breaking.

Q. Where you have one that you are going to have trouble with for months and months, that is always a tearing, isn't it?

A. It is likely to be.

Q. Where you have a slight sprain it may be just a strain and you get over it in a week or two or month?

A. Could be.

Q. Where you have a severe sprain or straining of the sacroiliac joint that is extensive enough, you would have a tearing of the fibers of the ligaments, wouldn't you, more or less?

A. Yes, sir, if it is severe enough.

Q. When it goes that far it is a very severe injury, isn't it?

A. No, I can't say that because I have seen actual injuries. I saw one man who fell a-straddle of a bin and tore his sacroiliac region right open, exposed the whole thing, tore the ligaments pretty much all out of the back, and he remained an active man in one of the Pillsbury mills for years afterwards.

Q. You would not state that as the natural result to be expected of other men getting hurt the same way?

A. They would not necessarily get the same result, but it doesn't always follow.

Q. That was one of these remarkable recoveries, wasn't it?

A. I am not so sure. I have seen only three cases I can recall of actual tearing open seriously of the sacroiliac and all got well as far [fol. 360] as the sacroiliac joint was concerned.

Q. If this man was hurt and has been lame ever since he got out of the hospital and been walking around as you have heard testified this time and last September and there has been no appreciable improvement in his ability to walk the last six or eight months or a year, what do you expect about the future of the leg?

A. Of course, the prospect is not so awful good for his walking.

Q. Then when you testified a little while ago you thought there was no reason this man would not work just about as well as ever after while, did you take that into consideration?

A. Yes, but I don't think that question as you put it there covers the whole case that a man could form a fair opinion on the facts as applied to this particular man.

Q. What did you assume was wrong with the leg?

A. I assumed he may have had a strained back.

Q. Does that mean the sacroiliac?

A. Yes, that is included. I mean a strain in that region, to be more specific. I based it on the assumption that I do not think he had sacroiliac disease. That was included in my assumption. I based

it on the assumption that he was doing much better than he was when I saw him in my office before, so far as getting about is concerned; those things at least.

Q. You do not think he could do very much work with the leg [fol. 361] as you find it now, do you?

A. Yes, I think he could do some work as it is now.

Q. What kind of work?

A. Such as involved getting about, such as involves what he does here.

Q. That isn't work?

A. It means carrying the weight of his body around on his leg.

Q. Could he carry a weight on his back as a laboring man is often required to?

A. I said in my original statement I didn't think he was ready for heavy labor.

Q. Does this nervous condition affect his leg, too, that you talk about?

A. It may very well. It affects his left hand, I am sure of that.

Q. That is, it makes the ulnar nerve worse?

A. No, it was not the ulnar nerve I referred to.

Q. In what way?

A. He told me in using his left hand occasionally the fingers would draw down in sort of cramp and he would have to rub them and get rid of that and it would go away. That could not possibly be due to the injury referred to.

Q. You said he didn't have any such grip in the left hand as in the right?

A. No, sir.

Q. Why not?

A. I don't know unless it is nervous condition.

[fol. 362] Q. As far as the ulnar nerve is concerned and the little finger, if you ask me to take hold of you and grip you, I could take those big fingers and thumb and grip you hard if everything was all right?

A. Yes, sir.

Q. But he didn't have that grip?

A. Well, he didn't use it.

Q. Then the plaintiff is pretending he had a weak hand?

A. Not necessarily. I don't think he was pretending about that thumb and finger; at least, I have no reason to think so, but I know perfectly well it is not due to organic——

Q. Hysterical, is it?

A. That would cover this thumb, I am sure of that.

Q. Was it this finger?

A. He said the first and second fingers.

Q. When he got a cramp in there holding cards that was hysterical, nervousness?

A. It could not be due to any injury because you do not get cramps from injured nerves.

Q. If an arm is injured, if he can't use it and has no strength and then you undertake to hold cards, you do not get cramps?

A. You could get cramps in certain injuries to the arm, but you don't get cramps from injury to that nerve.

Q. When you are speaking of this being somewhat of a hysterical condition, that is another word for nervousness?

A. Yes, sir.

[fol. 363] Q. Well, has nervousness got anything to do with his lame leg?

A. Certainly, I say it has.

Q. That is hysterical, too?

A. I have seen people who could not use their legs at all or thought they couldn't.

Q. Is this a case of hysteria as to the leg in your judgment?

A. I assumed that it probably was not, that he had had a strain of his back. I cannot say.

Q. When I say hysterical, I mean traumatic neurosis; I suppose when you spoke of this injury here that would be just hysterical because those were never hurt, is that the idea?

A. No, sir.

Q. That would be pure hysteria?

A. That is pure hysteria, I think, yes, sir.

Q. Just how would he get the notion in his head that those fingers are going to cramp if it is hysteria?

A. Well, it is more than I am able to explain, why hysterical people get all the notions they have. I am sure I could not do it.

Q. And all the time you want to be understood as not going into the realm of pretending; this is a real hysterical condition you are talking about?

A. If those fingers do that and I have no reason to doubt his statement, of course, it is hysterical.

Q. There is something wrong with his heart condition, whether it is hysterical or nervous or what, something wrong, anyway, isn't there?

[fol. 364] A. His heart is acting too rapidly, yes, sir.

Q. When you started in to examine him yesterday you said his pulse was 108, did you?

A. I said his pulse was 94 when we began the examination yesterday.

Q. When you began your examination last September his pulse was 87, wasn't it?

A. Yes, sir.

Q. He was not quite so nervous a year and a half ago when you started the examination as he was yesterday?

A. I don't suppose so. He had not been told he was liable to die on slight provocation.

Q. I suppose the fact he has heard somebody testify a year and a half ago that he was liable to die if he made a sudden violent exertion is the reason that the pulse was 94 yesterday when he went down to have you examine him?

A. No, I don't say that at all.

Q. Then what relation is there between somebody telling him that and the 94 pulse yesterday?

A. There are many things that enter into his nervous condition.

Q. You want to be understood as saying, then, that if any man like any member of the jury would hear doctors and others say, "You have got a bad heart here, if you happen to exert yourself too hard you are liable to kill yourself," your pulse is going to go up and stay up?

A. No, I didn't say that.

Q. This man's has stayed up, at least yesterday when he went down for this examination?

[fol. 365] A. No, it doesn't necessarily follow that it stayed up. If anybody told me and if I believed him that my heart was in such a condition as I have heard said about this man's heart, why if I had any sense at all and faith in what the man said, it would certainly affect me very badly.

Q. In what way?

A. I would be fearing I was going to die when I undertook any special exertion and any reference to my heart, if anybody talks about my heart, my heart goes to beating at once. That is a common experience of life.

Q. At any rate, down there yesterday his pulse was 94; then when you made a certain test you tried his pulse out; that was during the course of the examination, wasn't it, when you found it 108?

A. He had been lying on the table. I cannot say just exactly what particular part of the examination we were going through. We had been examining him and I asked him to sit up on the edge of the table and I then took his pulse and he walked around the room for me.

Q. And you took his pulse and when he sat on the table it was 108?

A. Yes, sir.

Q. And the normal pulse is 72?

A. 72 is normal; a little bit of allowance for the examination.

Q. But you would not put on from 72 to 94, would you?

A. No, sir.

[fol. 366] Q. The reason his heart was up to 94 instead of being slightly above 72 in the examination is because a lawsuit is pending and he is nervous over it and worried and think- he is going to die or something like that?

A. I don't know whether he thinks he is going to die or not, but if he did so his pulse would certainly be up.

Q. What is the change in the condition of the man's mental attitude between the time yesterday when it was 94 and the time it was 108, what was the matter there, what made it do that, that is, assuming all the time that his heart is normal, as you say?

A. Well, I don't know that his mental attitude has to do with the changes in the pulse rate from moment to moment. It is a perfectly well known fact that anybody who has what is called a nervous heart has a marked and rapid change in the pulse from time to

time and that even any little physical exertion or almost anything they do sets the heart to beating faster.

Q. Well, there was nothing especial occurred down there yesterday, was there, to make it go up fourteen degrees?

A. Not that I know of except, as I say, on the general principle as I have mentioned.

Q. And if he is in such condition in the heart and lungs there as testified to by the physicians for the plaintiff you could account for that sudden rapid increase in the beats of the heart?

A. I don't see why on that basis, because I have just said nothing [fol 367] special was happening. I might account for the increase in rate if he got up to walk around the room, but not when he was lying on the table.

Q. When he walked around the room it increased from 108 to 120?

A. Yes, sir.

Q. You say that is not abnormal under the same or like conditions when you are examining normal people?

A. It is abnormal to have a pulse of 108. Of course that is understood. I don't believe that the average healthy man walking around a room would go up to 120 as he did, three times around a room.

Q. Take the normal man thirty-four years of age, have him walk around the room rapidly, ordinary good health and start him in with a pulse slightly over 72. What would you expect his pulse beat to be when he got around the room two or three times?

A. If we mean the average man in respect to good health, walking around a room, I suppose his pulse would go up, I could not give the exact rate, but, oh, 85, maybe, something like that.

Q. Well, he would have to go pretty lively to get it up to 85, wouldn't he?

A. No, sir, because the very fact he knows he is going around that room for the purpose of seeing the effect of it upon his heart would make his heart go up if he was an average normal person.

Q. But the plaintiff went from 108 to 120, at any rate?

A. Yes, sir.

[fol 368] Q. Then it dropped back to 105, I think you said?

A. Yes, sir. In two minutes.

Q. Did you notice afterwards when it finally dropped back to 94, did you ever notice that again or whether it ever got below 94?

A. At any time in the course of the examination?

Q. Yes.

A. I didn't notice, I know, after this particular test, and whether I did any other time I do not recall. I have no record of any other pulse rate.

Q. What do you mean by nervous heart, Doctor?

A. There is something in your nervous system that controls the rate of the heart action. In most people it is controlled at about the rate of 72. Some people it is controlled at a good deal lower and some at considerably higher, the disturbance that lies somewhere in your emotional life.

Q. Hysterical again?

A. Not naturally. Hysterical means a certain type of hysteria. One can be very emotional without being hysterical. If I were tremendously frightened I might not be hysterical but I should certainly get a rapid heart action. The nervous system or that portion of it which ordinarily keeps my heart beating at about a certain rate would lose its capacity to keep it in that bound and it goes to beating very rapidly. That is what I mean by a heart that is out of control or acting rapidly on account of some nervous [fol. 369] condition in some people. In some people this thing continues. Instead of just developing only on certain frights, it is that way more or less continuously, sometimes for considerable periods of time, certainly as long as the nervousness lasts.

Q. Call it what you please, for the time being he has got to get over that before he can go out and exert himself very much, hasn't he?

A. No, I would not say just that. He ought to get over that before he goes to heavy labor. The best thing you can do with a man of that kind is to put him at gradually increased exercise.

Q. Anything wrong with his left lung?

A. Yes, I have testified there is a thickening, I don't know where, that takes up a certain amount of space.

Q. Doesn't amount to much?

A. Well, frankly, I don't think it does. I could not see there was a very great thickness of this tissue, but it is there and it is some impediment.

Q. The broken ribs cut no figure now, I suppose?

A. Broken ribs are very common in life and people do not seem to worry much about them.

Q. Is it a common thing for a man to go around with five crushed ribs that overlap the way these do?

A. No, I didn't say five. You said broken ribs. There isn't a football team in the country but what goes through with a certain amount of broken ribs and it doesn't bother those people.

[fol. 370] Q. Make any difference whether they are broken around near the region of the heart?

A. It would if they press on the heart, yes, sir.

Q. Wouldn't make any difference if it took up any of the space there where the heart and the lung work, would it?

A. Yes, if there was enough reduction of space it would make a difference.

Re-direct examination.

By Mr. Palmer:

Q. Dr. Hamilton, I would like to have you make a measurement of the plaintiff for me.

Mr. Palmer: You have no objection to the plaintiff stepping forward?

Mr. Anderson: No, sir, not in the least.

Mr. Palmer.:

Q. Dr. Hamilton, will you kindly measure the plaintiff's left leg when he is standing on the floor, from his heel to just above the patella of the knee?

Mr. Palmer: Now, Mr. Goneau, would you kindly raise your foot up, that is, on your toe? Get right up on your toe. Then, Doctor, will you kindly measure the distance while he is raised up on his toe to the point just above the patella of the knee?

A. Do you want it as high as it will go?

Q. Well, just up on the tip of the toe. Now, Doctor Hamilton, will you tell us the first measurement, that is from the heel to the point just above the patella of the knee when the plaintiff is standing with his foot on the floor?

A. Twenty-one and one-eighth inches.

Q. The second measurement, now, when he is raised up on his [fol. 371] toe, that is the left knee, his left leg, from the floor to the top of the knee pan or patella?

A. That is twenty-three, I make it, and one-sixteenth.

Mr. Anderson: What is it all about?

Mr. Palmer: Well, it has reference to the plaintiff's testimony about the raising of the draw bar.

Mr. Palmer: Gentlemen of the jury, at this time, under the stipulation of counsel, I will read the testimony given upon the last trial by Donald McIntosh, a civil engineer in the employ of the railway company, who made a survey and plat of the bridge on which this accident occurred.

The Court: This is the testimony to which I called your attention this morning which will be read to you because the witness is not here. You will regard it the same as though the witness were here and testified as counsel reads it.

Mr. Palmer (reading):

"DONALD MCINTOSH, called in behalf of defendant, duly sworn, testified as follows:

Direct examination.

By Mr. Palmer:

Q. Your name is Donald McIntosh?

A. Yes, sir.

Q. Where do you live?

A. Stevens Point, Wisconsin.

Q. What is your business?

A. Civil engineer.

Q. How long have you been a civil engineer?

[fol. 372] Mr. Anderson: Save time by admitting his qualifications.

A. Been following engineering work for twenty years.

Q. By whom are you employed?

A. Soo line railway.

Q. How long have you been employed by the defendant railway?

A. Since 1909.

Q. And on what division or portion of its road do you work?

A. I am assigned by the Northern District, Chicago Division.

Q. Where does that extend?

A. That belongs to the main line Stevens Point to St. Paul, Owen to Superior and Spencer to Ashland and branches.

Q. Are you familiar with the locality of Gordon, Wisconsin?

A. Yes, sir.

Q. And the location of the track there and the railway bridges?

A. Yes, sir.

Q. How long have you had that part of the track under your supervision, that is, as civil engineer?

A. I have worked on that line ever since it was built in 1907. It was the Wisconsin Central at that time.

Q. Extending from the depot at Gordon to the north or west, as you use it in railroad parlance, how many bridges are there just immediately north from the station of Gordon?

[fol. 373] A. Immediately north of the depot there is a bridge over a highway just a very short distance.

Q. Is that the highway that goes into the town of Gordon?

A. Into the village, yes.

Q. What is the next one?

A. A short distance north of that there is a bridge over the Eau Claire river.

Q. About what distance north?

A. I would say it was better than a quarter of a mile between the bridges.

Q. Then what is there?

A. Next is a crossing of the St. Croix river.

Q. And what kind of a bridge is that?

A. That is a hundred foot, deck plate girder and pile abutments, pile approaches on each end.

Q. Did you say one hundred foot deck?

A. Plate girder one hundred feet in length.

Q. What material is that made of?

A. The girder is of steel.

Q. What material is the frame work of the bridge?

A. I presume you refer to the approaches which are constructed of timber and the deck is timber.

Q. Just what do you mean by the deck?

A. Well, as regards the plate girder I refer in that case to the ties.

Q. And what is there in the way of cross pieces or girders below the deck or top part of the bridge?

A. Do you refer to the steel portion of the structure?

Q. Yes, steel or wood?

[fol. 374] A. Well, the steel girders carry the ties properly upon the top flange and the girders themselves rest upon pile abutments at either end. The approaches consist of bents of driven piling, capped and carrying stringers and the ties on top of the stringers.

Q. I show you Defendant's Exhibit No. 2, and will ask you if that is a substantially correct photograph of that bridge?

A. As it is now, yes.

Q. The time at issue here is October 27th, 1920, was the bridge any different then than it was when this photograph was taken?

A. The approaches have been reconstructed since that time.

Q. In what manner?

A. The piling has been redriven and new deck installed on the approaches.

Q. Have the approaches been built out any towards the stream so as to shorten the span portion of the bridge?

A. A short portion of each approach was filled in 1920. It was all done prior to October 1st because the steam shovel came out of the pit October 2nd, I think it was.

Q. Then on October 27th, 1920, was the bridge as far as the approaches were concerned and the length of the actual span, that is compared with the space below, the same as it was when this photograph was taken?

A. As far as the embankment is concerned what I call center line [fol. 375] profile, it stood exactly the same in October, 1920, as it does now, but the structure itself had been changed.

Q. But so far as length of the actual span is concerned, was it the same in 1920, October 27th, as it is now?

A. Yes.

Q. Then is there any other change that has been made since October 27th, 1920, in the bridge?

A. Well, the reconstruction included the renewal of the pile abutments, new plate girder, substantially the same type of abutment that was in there before.

Q. What is the length of the cross ties on October 27th, 1920?

A. Twelve feet.

Q. Has there been any change in those?

A. The ties on the new portion there are now ten foot ties.

Q. Look at that photograph, Exhibit No. 2, does that show where the ties have been made narrower one foot at each end?

A. Yes, it does.

Q. Did that condition obtain on October 27th, 1920, at the time of this accident?

A. No, none of the renewal work was done until the spring of 1921; that is, renewal of the timber structure.

Mr. Palmer: Now, with that explanation, I will offer in evidence Exhibit 2.

Mr. Anderson: I suppose that the purpose of offering the photograph, Mr. Palmer, is just simply to give the general photographic view of the general situation?

[fol. 376] Mr. Palmer: That is the sole purpose.

Mr. Anderson: If the reporter takes that down I will make no objection to it."

Mr. Palmer: Now, at this time and under that same understanding, if your Honor please, I would like to offer the Exhibit No. 2.

The Court: Received.

Mr. Palmer: It is a photograph of the bridge and I think the jury will understand the change in the structure; that shortening of the ties was made after the accident. The shortening is where that little gap appears in the side, but the jury will understand that that was done after the accident and at the time of the accident the ties were of uniform length, twelve feet.

Mr. Palmer (resuming reading of testimony):

"Mr. Palmer:

Q. Has there been any change in the structural portion of the bridge? I do not mean in material, but in the structural condition there other than the shortening of the cross ties, one foot on each end?

A. The general type of construction has been maintained, but there have been numerous changes in details in our plan, standard plan, of pile bridges and these details have been put into effect, the slight changes, in the reconstruction of these bridges.

Q. Now, is there any change that is observable there in that photograph excepting the shortening of those ties?

[fol. 377] A. Well, there were other changes, but this photograph does not bring them out.

Q. Now, there on the ground are there other changes that are observable to the ordinary observer?

A. Yes, the openings between bents have been shortened. The original standard was sixteen foot center to center of bent; the present standard is thirteen foot six inches center to center of bents.

Q. What do you mean by the bents?

A. One row of piling constitutes a bent.

Q. Across the bridge, underneath it to support it?

A. Yes, sir.

Q. Is that all that could be seen by the ordinary observer?

A. I think so.

Q. Then this photograph shows by this sort of gap between the twelve foot ties and the ten foot ties the place where those ties had been shortened?

A. It does.

Q. But those were not there October 27th, 1920?

A. Could not have been because the work was not done until 1921.

Q. Did you make a plat or drawing of this bridge in question?

A. I did.

Q. When?

A. This month, the month of September.

Q. For what purpose?

A. At the request of the chief engineer for the use of the legal department.

[fol. 378] Q. How did you make this?

A. Depended entirely upon my records.

Q. Do your records show just how the bridge was at the time of the accident?

A. A survey of that bridge was made in 1919 for the purpose of making recommendations for renewal or permanent work and I depended almost entirely upon that record in preparing that diagram.

Q. I show you Defendant's Exhibit 3 and will ask you if that is the plat or drawing of the bridge which you made, as you have testified?

A. That is the diagram I made.

Mr. Palmer: We offer the plat in evidence.

Mr. Anderson: No objection. With the understanding, if the court please, that it is competent to show any difference between the conditions that may have existed at the time of the accident. It can be received in evidence for the purpose.

The Court: Received."

Mr. Palmer: Now, at this time, if your Honor please, in connection with the reading of this witness' testimony, we would like to offer this plat, Exhibit 3.

The Court: Received.

Mr. Palmer (resuming reading of testimony):

"Q. Is this drawn to a scale?

A. Scale five feet to the inch.

Q. And what does the plat show?

A. It shows the deck plan of the entire structure, and the elevation view.

Q. Which shows the deck plan?

[fol. 379] A. The upper diagram.

Q. And which shows the side elevation?

A. The lower diagram.

Q. Now, will you show to the jury on this plat just where the span begins?

A. The ground line is indicated by a heavy black line on the elevation. For instance, this slope and the one at the other end indicates the end slope of the embankment.

Q. How far is that from where the cross ties forming the top of the bridge begin?

A. From the southerly end of the approach it would be approximately forty-five feet of heavy bank. That is where the slope began to go down.

Q. And on the northerly end will you tell us what that distance is?

A. Approximately thirty feet.

Q. Are the cross ties shown there accurately?

A. As to general dimensions they are shown. That is the general plan and the space and I have indicated them in that way.

Q. Does it show the space between them correctly?

A. Approximately, yes.

Q. What is the space between the ties?

A. Well, the ties on that bridge were approximately twelve inch centers; that is, twelve to thirteen inches from center to center of tie.

Q. And how wide are the ties themselves?

A. The ties on the girder were seven inch top. The ties on the plate girder were seven by nine; that is, they were seven inch top, [fol. 380] nine inch deep. The ties on the approaches were six by eight, eight inch top and six inches deep.

Q. On the span, then, what distance, approximately, would that leave the space actually between the ties from the edge of one tie to the edge of another?

A. It would run from five to six inches.

Q. What is the width of the ties lengthwise on the original structure as it was on the 27th of October, 1920?

A. Twelve feet long.

Q. Was that length uniform throughout the entire bridge and approaches?

A. Yes, all the ties were the same length at that time.

Q. What is the space between the rails, the gauge of the track?

A. Four foot eight and a half inches.

Q. Then from the center of the track to the rail would be how far?

A. One-half the gauge, two foot, four and one-quarter.

Q. From the rail out to the end of the tie how far would it be?

A. From the gauge line it would be three foot seven and three-fourths inches.

Q. What do you mean by the gauge line?

A. The inside edge of the ball of the rails.

Q. I take it that the rails are laid so that the center of the track would be the center of the ties?

A. Yes.

[fol. 381] Q. Then from the center of the track to the end of the ties, would be how far?

A. Six feet from the center of the track.

Q. What else is indicated on this deck plan here except the ties, what are these along there?

A. The guard rails.

Q. What is the guard rail, point that out?

A. Long timber outside of the rail. Running parallel to the rail.

Q. And the black lines?

A. Indicate the rails.

Q. What do you mean by a guard rail?

A. A timber placed just outside of the track rail on either side, laid one inch over the ties, for the purpose of holding the ties in position and for protection in case of derailment.

Q. How large a timber is this guard rail?

A. Five by eight.

Q. And which part is on a level with the top of the bridge?

A. The eight inch surface. It would be five inches deep.

Q. What else is indicated on the deck plan?

A. The location of the stringers on the approaches.

Q. What indicates those?

A. Short lines between the ties. On the approaches.

Q. The guard rail, then, leaves off there at the approaches?

A. You will notice that on either approach the spacing of the ties at the end is indicated somewhat differently than it is on the rest of [fol. 382] the bridge. Now, that is the manner in which the deck had been opened up for filling purposes. The guard rail had been taken off and the ties spaced on the portion which had been filled.

Q. Was that the situation on October 27th, 1920?

A. To the best of my memory, it was. I haven't an absolute record as to just how much of that deck had been opened up in that manner. It was over there at the end of the approach.

Q. Was it filled up entirely below those ties?

A. To the best of my memory, it was only opened up over the filled portion.

Q. You mean the filling had not been put in yet?

A. Oh, yes, in October, 1920, the filling had been put in.

Q. Was it brought up level with the track?

A. Up to the stringers.

Q. What are these longer portions that seem to come out on either side?

A. The end of the cap timbers indicate the location of each bent, the end of the pile abutments which carry the steel girder.

Q. Across the top of these piles, that are driven there is put a timber, is that what you mean by the cap?

A. Twelve by fourteen and twelve by twelve are used for the cap timbers.

Q. Those are somewhat longer than the ties?

A. The cap timbers on the approach were twelve by fourteen, [fol. 383] fourteen feet long. The cap timbers on the abutment bents were twenty feet long.

Q. How many of those twenty feet ones are there?

A. A total of six.

Q. That is on the abutments?

A. On the abutments only.

Q. How far are those caps below the floor of the bridge?

A. The caps on the pile—bents of the approach were only twenty-nine inches below the base of the rail.

Q. What is the length of the actual steel span of the bridge at that time?

A. One hundred feet.

Q. What shows on this plat where that begins?

A. Indicated and marked "Hundred foot deck plate girder." Indicated by the heavy black line.

Q. What is shown by this side elevation plan just below the deck plan?

A. Ground line location of each timber bent, location of the deck plate, stringer, ends of the ties, one side of the longitudinal braces.

Q. What indicates the ground line?

A. Black line.

Q. And what indicates the abutments?

A. Two groups of three upright piling.

Q. What indicates the bents?

A. They are indicated by two lines indicating the location of each pile. The two vertical lines.

Q. With the cap indicated on the top of them?

A. The end of the cap.

[fol. 384] Q. What is shown by these lines running longitudinally?

A. Well, those you are pointing at represent longitudinal braces, six by eight timber stuck from one bent to another.

Q. What is the size of them?

A. Six by eight.

Mr. Spooner: Those are wood, I suppose?

A. Timber, yes.

Q. How far are those below the floor of the bridge?

A. About twelve feet.

Q. There are none of those indicated in the actual one hundred foot span?

A. Oh, no.

Q. What is that black longitudinal line, in the actual span?

A. Indicates the bottom of the steel girder.

Q. And that is designed for bracing purposes, I suppose?

A. No, the girder itself is that deep.

Q. How deep is it, how much below the floor of the span?

A. I think *is* was ten feet and nine inches from the top of the tie to the bridge seat of that timber.

Q. Do you indicate where the water of the stream was at that time?

A. I have indicated the water level as it stood there at the time of the permanent work, survey; I cannot say that was the exact level that stood there in October, 1920, but that stream doesn't vary very much.

[fol. 385] Q. What is that distance from the beginning of the bridge, back to the first bent north of the pile abutments?

A. Approximately seventy-eight feet, according to this scale.

Q. And what is the distance between that pile abutment and the next one to the north?

A. About sixteen feet.

Q. Now, from where the ground line goes down showing an open space below the bridge as indicated by the 4th bent from the pile abutments, how far is that from the beginning of the approach?

A. About thirty-two feet.

Q. Then what is the distance between that fourth bent I speak of to the next bent to the south?

A. Approximately fifteen feet.

Q. We can count those distances for ourselves?

A. Well, you can figure that in general these openings are sixteen feet.

Mr. Anderson: At any rate, aren't these squares all one inch?

A. Oh, yes.

Q. That distance between the heavier red lines forming the squares there, the distance between those each way is one inch which indicates five feet of actual distance?

A. Each one inch square is five feet.

Q. And those are marked by the heavier red lines?

A. Each of the small squares would be one half foot either way.

Q. That is true, is it, with respect to both the deck plan and the side elevation?

[fol. 386] A. Exactly the same scale throughout.

Q. Tell us where the approach begins at the south to where the approach begins at the north the entire length of the bridge and approaches?

A. The entire length of the structure was 297 feet.

Q. This photograph, Exhibit 2, indicates some water barrels setting on the bridge, where are those placed?

A. They are generally placed outside of the ends of the ties. They are generally fastened to the timbers out there for the purpose of carrying them or they might be set one at each end of the bridge off the structure entirely.

Q. Do you recollect where they are on this bridge?

A. I do not. I never paid any attention to that.

Q. Is there any place indicated here in between?

A. Not on this diagram. I couldn't say whether there was any water barrels in between the ends of that bridge or not.

Q. What is the drawing here at the left end?

A. That is a larger scale, cross section view, you might call it, of the track on the structure. Just as though you would cut right across the track indicates the length of the tie, height of the rail, relative position of the rail and guard rail.

Q. And this outline in the black, is that a tie?

A. There is a tie indicated there, the long timber.

[fol. 387] Q. What scale is used for that?

A. That is drawn on a slightly different scale, that cross section. It is one foot to the inch.

FRANK X. ROCHELEAU, on behalf of defendant, duly sworn, testified as follows:

Direct examination.

By Mr. Palmer:

Q. What is your full name?

A. Frank X. Rocheleau.

Q. Where do you live?

A. Iron River, Wisconsin.

Q. How long have you lived there?

A. Twenty-four years.

Q. How old are you?

A. Forty-four, past.

Q. You are a man with family?

A. Yes, sir.

Q. What is your business?

A. At the present I am engaged in the lumber business at Park Falls.

Q. And how long have you been engaged in that work?

A. About seven months.

Q. And prior to that time what was your work?

A. Different—jobbing, small lumbering, scaling and one thing and another, railroading some.

Q. And when did you do your last railroading?

A. October 30th, I think, 1920.

Q. For what railroad company were you working then?

[fol. 388] A. Soo Line.

Q. How long had you been with the Soo Line up to October 30th, 1920?

A. Since 1918, two years, I believe it was.

Q. In what capacity did you work for the Soo Line?

A. A brakeman.

Q. How long had you been in the railway service, for all company?

A. Approximately twelve or thirteen years that I served as a railroad man.

Q. What other companies did you work for besides the Soo Line?

A. Duluth, South Shore and Atlantic.

Q. All the time as brakeman?

A. Yes, sir.

Q. You were at work for the Soo Line about two years?

A. Yes, sir.

Q. You quit on October 30th, 1920?

A. Something like that.

Q. That was only about three days after this accident?

A. Yes, sir.

Q. Now, were you working for the Soo Line at the time of this accident?

A. Yes, sir.

Q. On what division?

A. The Chicago Division.

Q. Running from where to where?

A. From Ladysmith, Wisconsin, to Superior, Wisconsin.

[fol. 389] Q. How long had you been on that run?

A. I believe that was my first trip on that run at that time.

Q. What run had you been working on?

A. I had been working on the Duluth and Superior Division west through here.

Q. In what capacity?

A. Brakeman.

Q. Did you ever work as passenger brakeman.

A. No, sir.

Q. Were you a brakeman on this train the night of this accident?

A. Yes, sir. I was the head brakeman.

Q. Who was the rear brakeman?

A. Mr. Goneau.

Q. Who the engineer?

A. Mr. Barnaby.

Q. Who was the fireman?

A. Mr. Manchester.

Q. Who was the conductor?

A. Bailey.

Q. Did that constitute all the crew?

A. Yes, sir.

Q. You started from Ladysmith?

A. Yes, sir.

Q. What was the number of your train?

A. 43.

Q. Is that a way-freight or time-freight?

A. I think it was a carded time freight.

Q. Do you recollect anything about what time you left Ladysmith?

A. No, sir.

[fol. 390] Q. Do you recollect anything about what time this accident was?

A. It was in the evening sometime.

Q. Where were you riding?

A. I was riding on the engine.

Q. What is the first thing you knew about this accident?

A. We come to a sudden stop and I, of course, knew at the time that there was something that had happened, so I got out of the engine and started back to see if I could locate it.

Q. Was that part of your duty?

A. Yes, sir.

Q. Who else was on the engine?

A. The engineer and the fireman.

Q. Barnaby and Manchester?

A. Yes, sir.

Q. Did you know it was an emergency stop?

A. Yes, sir.

Q. How quickly did you get out of the engine and start back?

A. Immediately.

Q. Do you know about how large a train you had?

A. I thought at the time we had seventy-two cars, but I have heard since that it was less than that.

Q. It was a pretty big train, anyhow?

A. Yes, sir.

Q. Where did the engine stop—you were on the engine, as I understand it?

A. Yes, sir.

[fol. 391] Q. About where was that with reference to Gordon?

A. We had gone through Gordon, anyway.

Q. Did you make any stop at Gordon?

A. No, sir.

Q. Do you know where the engine stopped with reference to these bridges that the engineer has testified about?

A. The engine was west of those bridges that you are referring to.

Q. Was it west of all the bridges?

A. Yes, sir.

Q. All three of them?

A. Five of them.

Q. Five of them going out of Gordon. Which one first?

A. The highway going out of Gordon, the Eau Claire River, St. Croix River, the Omaha and the State Trunk Highway No. 11, I believe it is.

Q. And your engine was west of all of them?

A. Yes, sir.

Q. The time you got out of the engine and started back towards the rear, will you tell us just what you did and what happened, as nearly as you can remember?

A. I worked on back until I came to the bridge over the wagon road, the State Trunk Highway, and I got up on top of the cars and walked over and got down again on the north side of the train, on the engineer's side, and I walked back until I came to the Omaha bridge and by that time I saw a lantern back at the hind end and [fol. 392] when I got right up to the bridge I got some signals from the hind end of the train and I repeated them.

Q. What do you mean by the hind end?

A. Well, that is towards the caboose.

Q. Do you mean the extreme hind end of the train?

A. You couldn't tell from where I was, but it was coming from the hind end of the train.

Q. You didn't know who it was back there?

A. No, sir, I did not.

Q. Did you afterwards learn?

A. Mr. Goneau.

Q. Could you tell how far back he was from you?

A. No, I could not.

Q. Was he some distance back from you?

A. Yes, he was some distance from me.

Q. Could you see his lantern plainly?

A. Yes, sir.

Q. Tell us what the first signal was?

A. Back-up signal.

Q. Given with what?

A. With the lantern.

Q. Could you see that plainly?

A. Yes, sir.

Q. Where were you then, Mr. Rocheleau?

A. I was standing on the west end of the Omaha bridge.

Q. Were you on the cars or on the track?

A. No, I was on the ground.

Q. Are you sure you were on the ground?

A. Yes, sir.

[fol. 393] Q. At the west end of the Omaha bridge?

A. Yes, sir.

Q. And could you see this lantern signal?

A. Yes, sir.

Q. Tell us where that lantern signal was given from?

A. From the ground.

Q. Are you sure about that?

A. I am quite positive.

Q. It has been testified here by Mr. Goneau it was given from the top of the train?

A. Yes, sir.

Q. Would you know it if it was given from the top of the train?

A. Why, I think I would, yes.

Q. You saw it given?

A. Yes, sir.

Q. And was it down low or up high?

A. It was low, down low.

Q. What did you do?

A. I repeated it to the engineer.

Q. Was that part of your duty?

A. Yes, sir.

Q. Then what occurred?

A. We backed up the train and when the cars came together he gave another signal with his lantern across the track which is understood to indicate a stop.

Q. About how far did he back up?

A. That I couldn't say.

Q. Did you hear the cars strike together?

A. Yes, sir.

[fol. 394] Q. And then what happened?

A. He swung him down, as we say; give a signal to stop.

Q. Did you do anything about that signal?

A. Yes, sir, I repeated it.

Q. Then what happened?

A. Well, the train came to a stop then and for some time his light went out of sight.

Q. Whose?

A. The back brakeman, Mr. Goneau's, and I waited there an instant or so, I don't know just how long, but he came out again and he gave a slack-ahead signal.

Q. How is that given?

A. Given with the lantern, short strokes up and down.

Q. What does that mean?

A. That means to go ahead a little bit. We use it to pull the slack out of the cars to see whether the coupling has made or part the cars again to make the coupling over again.

Q. What did you do with reference to that signal?

A. I repeated it.

Q. Then what was done?

A. The engineer slacked ahead.

Q. About how far?

A. I couldn't tell you. I don't remember how far he went. It wasn't no long distance or anything. It was a slack-ahead movement.

Q. Then what happened?

A. Then Mr. Goneau went in between the cars again, and he came [fol. 395] out again and gave another back-up signal.

Q. What did you do with reference to that?

A. I repeated it to the engineer to back-up again. And the cars came together and I stood there a while; that is, in the first place. After the cars had come together he went out of sight again between the two cars and I stood there sometime watching for signals; not very long. Finally after an instant or two, maybe a half a minute I should judge, why, I see his lantern come out and when it got out away from the car a foot or two feet, something like that, from the car, it disappeared.

Q. Where did it go?

A. I don't know. It went out. I couldn't see any more of it.

Q. It disappeared?

A. Yes, sir.

Q. Which direction did it disappear, could you tell?

A. Well, it just come out like that (indicating) and went out as though you would blow it out.

Q. How long do you think that Goneau was in between the cars before he came out the second time that his light disappeared?

A. Oh, I don't know how long; it would be long enough to do some work that was required to do in there, like coupling up hose, turning the angle cocks and one thing and another.

Q. Then the light disappeared, as you have said?

[fol. 396] A. Yes, sir.

Q. Was that the last signal that he gave you?

A. Yes, sir.

Q. Mr. Rocheleau, where were those signals given from?

A. They were given from the ground.

Q. All of them?

A. Yes, sir.

Q. And where did you repeat them from?

A. From the ground.

Q. Are you sure about that?

A. Yes, sir.

Q. And the last signal that he gave you was what?

A. Well, now, I don't remember whether he gave a stop signal at that time or not. I would not say positively, but if I remember right, he did not. I think it was a back-up signal, the last signal I got from him.

Q. And then the cars went together?

A. Yes.

Q. But you saw the light then go in between the cars?

A. Yes, sir.

Q. After this light disappeared what did you do?

A. I stood there for some time, quite a while, about possibly ten or fifteen minutes, and I didn't see no more movement back there so I got up on top of the cars and walked back, got over on top of the bridge and got down on the ground again.

Q. Which bridge was that?

[fol. 397] A. The Omaha bridge.

Q. In order to get over that bridge you got on top of the cars?

A. Yes, sir.

Q. And when you got over the bridge what did you do?

A. I got down on the ground again and started back to the back end of the train and when I came to the St. Croix bridge I got back on top again to go over the bridge and when I got up on top of the car and started back, I stepped over a place between the two ends of the cars and I saw an S-wrench and a hose there lying on the car in the snow and underneath at that point the air was leaking in the air hose in the connection some place, so I got down onto the bridge.

Q. How far had you got on the St. Croix River bridge, before you came to this car on which you found this S-wrench and hose?

A. I don't know how far I did go.

Q. Was it on the bridge a ways?

A. Yes, it was out on the bridge a ways.

Q. You were walking then on top of the cars?

A. I don't know whether it was the second car or the first car, I couldn't say.

Q. I see, but it was out on the bridge, anyway?

A. It was out on the bridge, anyway.

Q. Was it the car on which you found the hose and S-wrench that you heard this leaking?

A. Yes, it was just as I would step over; it was underneath me where I found the wrench going east.

[fol. 398] Q. And which end of the car was that S-wrench and hose on?

A. It was on the west end of the east car of that leak.

Q. Then tell us what occurred?

A. I got down on the bridge, and I heard some moaning and I stood there listening for a minute and I heard it again, but I could not locate it, sounded like a long distance away, so I closed the angle cock on the train line.

Q. Which angle cock did you close?

A. The one to me on the west car. It would be the one on the north side of the train coming west.

Q. You were on the north side of the train?

A. Yes, sir.

Q. Would that be the car directly west of the one you found the S-wrench and hose on?

A. Yes, sir.

Q. And that angle cock would be on your side?

A. Yes, sir.

Q. And you turned the angle cock?

A. Yes, sir.

Q. Shut it off?

A. Yes, sir.

Q. What did you do that for?

A. To stop that leak, and I thought before that possibly that he had gone back to the caboose to get a gasket to put in there and I had some in my pocket, so I thought I would go down and fix it and

when I got down there I heard this moaning. It kind of seared me a little. I didn't know what to make of it. I stood there on the [fol. 399] bridge and I pulled this angle cock closed and by that time he let quite a groan out of him, so I heard him plainly, so I hollered to him down below if that was him and he said, "yes."

Q. What did you holler?

A. I says, "Is that you down there, Goneau"? He said, "Yes."

Q. Now, at that time when you got down off the car, did you climb down the car that you found the S-wrench and hose on?

A. Yes, sir.

Q. Had the snow been falling?

A. Yes, sir.

Q. Did you see any tracks around there?

A. I don't remember now whether I did or not.

Q. Either on the cars or on the ground?

A. No, sir.

Q. When you climbed down off of this car on which you found the S-wrench and the hose, I want to ask you what space there was between those cars, that car and the next one?

A. They were right up just about as tight as they could get.

Q. Were they coupled?

A. Yes, sir.

Q. Was the coupling made?

A. Yes, sir.

Q. What about the air hose connection?

A. The air hose was connected.

Q. The air hose was connected?

A. Yes, sir.

Q. Are you sure about that?

[fol. 400] A. Yes, sir.

Q. And was that what made this leaking sound?

A. Yes, sir.

Q. Did it make considerable noise?

A. Yes, sir.

Q. And that is why you closed the angle cock?

A. Yes, sir.

Q. After you heard this groaning and called down and asked if that was Goneau and he said "yes," what did you do?

A. Well, I immediately went down there. I crawled along the cars and got pretty well back up and I jumped off of the bridge.

Q. Did you go clear back to the hard ground?

A. No, I did not. When I got back there was only three or four feet, something like that, and I jumped off. Then I went down to where he was.

Q. Now, where was he?

A. It was partly filled and the slope was down towards the river. I don't remember whether the slope covered more than two bents or whether there was three in it, but he was down to where there was a brace running from one bent to the other, running west and east from one bent to the other, and this girder, that is what we would

call it, was partly covered with this filling that they had put in there and that was—I don't know what distance that was.

Q. You mean the cross piece was partly covered by this filling?

A. Yes, sir.

Q. All right, where was he lying?

[fol. 401] Well, he was not lying; he was sitting up when I got to him.

Q. Could you see where he had originally fallen?

A. Yes, sir.

Q. Where was that with reference to where he was sitting?

A. About three or four feet, I should judge, up further on the side of the bank.

Q. Did you see his lantern?

A. Yes, sir.

Q. Where was that?

A. That was in under the bridge, more on the inside of the bridge and down about opposite where he was sitting, some three or four feet below where he had fell.

Q. Was he sitting under the bridge so that he was under the bridge or outside of it, could you see?

A. No, he was about on the outside of the bridge.

Q. And which side was that?

A. That was on the north side.

Q. And the lantern, too, was that on the north side?

A. If I remember right, it was about in the center of the bridge underneath.

Q. Then what next occurred after you found him sitting there?

A. I asked him if I could help him up and he said, "No, don't touch me," so I didn't touch him and about that time I saw a lantern coming from the back end of the train. He came up to the bridge [fol. 402] and he hollered over to me.

Q. Who did?

A. The conductor, Mr. Bailey, what was the matter, and I told him Goneau had fell off the bridge.

Q. How was the conductor coming?

A. He was coming on the ground when he hollered. When he got to the bridge he got up on top of the cars and came over.

Q. Did you see him on top of the cars?

A. Yes, sir.

Q. After he got to the bridge?

A. Yes, sir.

Q. Did you see him when he started to come down the bank where you were?

A. Yes, sir.

Q. How far did he go on top of the cars?

A. He went past us. I don't know just how far.

Q. He went past you on top of the cars, did he?

A. Yes, sir.

Q. Whether he went clear to the end of the bridge or not, you don't know?

A. No, I don't know.

Q. Then he called to you before he came down?

A. He called to me from across the river.

Q. Oh, before he began to come.

A. Before he climbed up on top of the cars he asked me what was the matter.

Q. And what did you say?

A. I told him that Goneau had fell off the bridge.

[fol. 403] Q. How soon after that did the conductor get there?

A. Well, about as fast as he could get there.

Q. Then what happened?

A. He grabbed him and was going to try to help him up and he told him to leave him alone, that he didn't want him to touch him. Mr. Bailey talked with him there for a minute or two or half a minute, something like that, and he told him what the trouble was and he says to me, "I will go up and get across the bridge."

Q. Who said that?

A. The conductor, "and get at the hind end of the train," and he says, "when you see me back there quite a distance," he says, "you back the train up." So I stayed down there with Mr. Goneau and when I saw him going around—there is a kind of a curve in the track there—about as far as I could see him, he gave me a signal to back up so I ran up to the edge of the bridge and gave the engineer a signal to back up over the bridge and we backed up to the bridge. I got up on the engine—they were still moving—and I told the engineer and fireman what had happened and I says, "We will back up over the bridge and cut the engine off and come back to see if we can get him on the engine." So we did that.

Q. Get back off the gridge?

A. Yes, sir.

Q. When he went back after he left you saying he would go to the hind end, did you see the conductor go back?

[fol. 404] A. Yes, sir.

Q. How did he go?

A. Why, he went over the cars part of the way, anyway on the bridge. After he got on the other side of the bridge he got down on the ground again.

Q. Did you see him start from the west end of the bridge?

A. I couldn't say whether it was the extreme west end or not.

Q. But he went on top of the cars, did he?

A. Part way. I saw him going over the river on the cars.

Q. When you saw him reach the other side you went up and signaled the engineer to back up onto the bridge?

A. Not until he got back pretty well to the hind end of the train.

Q. Mr. Rocheleau, did you go to this place where you found the leak and where you found this angle cock and this S-wrench and hose, did you go to that again before you backed up?

A. No, sir.

Q. Did you connect up that train at all?

A. No, sir.

Q. Did you touch the air hose at all?

A. No, sir.

Q. Or make any connection or coupling or anything whatever?

A. Nothing only closed the angle cock; that is the only thing I did there.

Q. And from that time until you signalled to back up you had not been there at all?

[fol. 405] A. No, sir.

Q. And when you did signal to back up and the engineer backed off the bridge, did he move the train off the bridge?

A. Yes, sir.

Q. Did it break in two at all while you were going through that operation of backing off of the bridge?

A. I don't know whether it broke in two after we stopped, but it didn't break in two while we were in motion.

Q. Did you back clear off the bridge?

A. Yes, sir.

Q. Then what was done after you backed off the bridge?

A. I cut the engine off and we came back on the west side of the bridge and the engineer and the fireman and I went down and tried to get him up onto the engine. And if I remember rightly, I went and looked for a board or something to put him on. And I know I couldn't find any and we didn't have any means to carry him up, so I don't know who it was suggested to wait until the passenger train came and get a cot off of it. So we did that.

Q. Did you stay down there with him until the passenger came?

A. Yes, sir.

Q. That was No. 18?

A. No. 18.

Q. How long before No. 18 came?

A. Oh, it was quite a while, I should judge.

Q. Where did it stop?

[fol. 406] A. At the west end of the bridge.

Q. Then what occurred?

A. They came down there, a few men, I can't just remember who they were, with a cot, and put Goneau on it and we carried him up.

Q. About how long was it from the time that you cut the engine off and came back with the engine to the west end of the bridge and went down to him before the passenger got there?

A. I couldn't tell.

Q. What were you doing down there during that time?

A. I was just walking around.

Q. You looked for this board some time?

A. Well, that was before the engineer left and the fireman.

Q. What was Goneau doing?

A. Why, he was sitting down on the south side of the bridge there on the ground or on a log. I don't just remember what he was doing or what he was sitting on.

Q. The south side of the bridge?

A. Yes, sir.

Q. How did he get to the south side of the bridge?

A. Why, I think he walked over there, if I remember rightly.

Q. You saw him walk?

A. Yes, sir.

Q. At any rate, when you finally took him out to take him on the passenger, which side of the bridge was he on?

[fol. 407] A. He was on the south side.

Q. You think he was sitting on a log?

A. Something.

Q. He said something about a mackinaw, do you remember anything about that?

A. Yes, sir, he asked me if I would give him my mackinaw and I took my mackinaw off and I put it on him. He was sitting over on the south side of the bridge when I did that.

Q. Did you put the mackinaw on him yourself?

A. Yes, sir.

Q. Was that after you had come back with the engine?

A. Yes.

Q. Did you have any talk with him about how the accident happened, Mr. Rocheleau?

A. Well, I said to him, I says, "How did you happen to fall?" "Well," he said, "I stepped off."

Q. He said he stepped off?

A. Yes, sir.

Q. When was this?

A. That is when I first got to him.

Q. After you put him on this stretcher and put him on the passenger train, will you tell us what next occurred, as nearly as you can?

A. I don't know what happened after we got to the depot. He sat in the chair until we got to the depot and they grabbed him and took him out and that is the last I saw him until we put him in the caboose again.

Q. Did you see a doctor there with him?

A. Yes, sir.

[fol. 408] Q. Dr. Blythen?

A. Yes, sir.

Q. Then what was done?

A. We went to Superior, then.

Q. Did you go to Superior with him?

A. Yes, sir.

Q. What did you have him on in the caboose?

A. I think he sat in one of them beds that they have in the caboose that the trainmen sleep in, propped up with pillows behind him and bed clothes.

Q. Did you take your whole train to Superior?

A. No, sir. We sidetracked all we could east of Gordon and took the balance to Superior with us.

Q. On the last trial you showed us something about the place, as nearly as you could recollect it, where Mr. Goneau fell from the bridge; can you point out on this plat where that was, Mr. Rocheleau?

A. This was where he fell (witness indicating).

Mr. Anderson: It is marked there. He has got it already marked on the other trial.

Q. Between the third and fourth bent?

A. Yes, sir.

Q. That X mark there represents what, do you remember?

A. About where he fell.

Q. And then this round dot here (counsel indicating)?

A. Is about where I found him.

Q. This X mark indicates the places where the mark was in the snow?

[fol. 409] A. Well, it was snow and sand.

Q. This X mark down here at the bottom of this 5th bent here, what does that indicate?

A. He sat there for sometime. I don't know whether he was there when the engineer and fireman came, but I think he was up here part way (indicating) when Mr. Bailey came, if I ain't mistaken.

Q. That is, when the conductor came?

A. Yes, sir.

Q. What is this here (indicating on map)?

A. That indicates where he was sitting on the opposite side of the bridge.

Q. Was he sitting by that bent a while, is that why you have that mark there?

A. Yes, he sat there some time.

Q. Was that before he sat on the log?

A. Yes, sir.

Q. And those are the places that he fell and where he went to and where he sat, as nearly as you can recollect?

A. Yes, sir.

Cross-examination.

By Mr. Anderson:

Q. How old did you say you are?

A. Forty-four years old.

Q. When did you do your first railroading?

A. I think I was between twenty-one and twenty-two years old then.

Q. Where did you work then?

[fol. 410] A. For the South Shore, Duluth; South Shore and Atlantic.

Q. Doing what?

A. Braking.

Q. How long did you brake then continuously before you quit that job?

A. Four years, if I remember rightly.

Q. Winter and summer?

A. Yes, sir.

Q. Then what did you do?

A. I worked off and on. When business got slack, I could not hold a job and went somewhere else and worked.

Q. At the end of four years do you mean you quit voluntarily or because business was slack?

A. Because business was slack.

Q. You were not discharged?

A. No, sir.

Q. What did you do then?

A. Common labor, anything I could get to do to make a living.

Q. Mostly common labor?

A. Yes, sir.

Q. And when did you railroad again so as to have a steady job where you worked for half a year or a year at a job?

A. Different times they would call me back to go to work.

Q. Did you ever work for the South Shore any time a year altogether, one time?

A. I don't remember whether I did or not.

Q. Well, you just testified you worked for them for four years when you started?

[fol. 411] A. Yes, sir, I worked on a log run for them four years.

Q. You mean where somebody was getting out logs?

A. No, sir, they were hauling logs, the South Shore was, for the Edward Hines Lumber Company, Madison.

Q. How long a run did you have?

A. Eighteen mile run.

Q. Well, then, you went back and forth with a log train there?

A. Yes, sir.

Q. When did you first do any braking on commercial trains?

A. Oh, from that on, off and on, I ran between Superior and Thomaston, Michigan.

Q. What road?

A. South Shore.

Q. Is that the first commercial railroading you did?

A. Yes, sir.

Q. When did you do that?

A. Some six or eight months. I started after they broke up the log run.

Q. You testified that you asked Goneau when you went down below the bridge how he happened to go off the bridge, didn't you?

A. Yes, sir.

Q. You testified Goneau told you that he stepped off?

A. Yes, sir.

Q. You mean that, do you?

[fol. 412] A. Yes, sir.

Q. I hold in my hand Plaintiff's Exhibit F, consisting of three written sheets of paper; I hand you the first sheet and ask you to look at the signature at the bottom of that and state whether or not that is your signature?

A. Yes, sir.

Q. Is that your signature at the bottom of the second page?

A. Yes, sir.

Q. Is that your signature at the bottom of the third page?

A. Yes, sir.

Q. I call your attention to the date at the top of the first page, November 1st, 1920, isn't it?

A. Yes, sir.

Q. That Exhibit F is a written statement made out by the claim agent Bratager, wasn't it?

A. Yes, sir.

Q. On November 1st, the date it is dated?

A. Yes, sir.

Q. And the statement on the three pages was signed by you?

A. Yes, sir.

Q. And signed under the words "This is correct"?

A. Yes, sir.

Q. You read those words, didn't you?

A. No, sir, he read them to me.

Q. So you knew they were there?

A. Yes, sir.

Q. Did you read the statement?

[fol. 413] A. No, sir.

Q. Did he read it to you?

A. Yes, sir.

Q. And this is made out the 1st of November, four days after the accident, wasn't it?

A. Something like that.

Q. Your memory at least as to the facts at that time was as good as it is now, I take it?

A. Yes, sir.

Mr. Palmer: Do you offer the statement?

Mr. Anderson: Not yet.

Q. Did you not say in the statement that you signed on the 1st of November, that he, Goneau, it means, "was unconscious when I found him and I did not hear him say how it happened at any time after the accident"?

A. No, sir.

Mr. Palmer: Wait a moment. That is objected to unless the statement is offered in evidence.

The Court: Objection overruled.

Mr. Palmer: I object to counsel reading from a statement unless it is offered.

The Court: Well, he has a right to ask him that question in the form it is in, anyway.

Q. Do you say "no, sir," positively?

A. Yes, sir.

Q. Where were you and Mr. Bratager when he was taking this statement, Exhibit F?

A. In the Belknap Hotel.

Q. Mr. Bratager was the investigating claim agent for the railroad at that time?

A. I believe so.

[fol. 414] Q. And he is here in court and has been right along?

A. Yes, sir.

Q. This was written out by Mr. Bratager?

A. Yes, sir.

Q. And he read it to you?

A. Yes, sir.

Q. Did he read that to you?

A. Not to my knowledge he didn't, no, sir.

Q. Well, then, you want to be understood, as long as that is in your written statement, that Mr. Bratager wrote it in?

A. I don't know how it got there. You will have to ask him.

Q. You did not tell it to him?

A. No, sir.

Q. So that Mr. Bratager when he read it, did not read that to you?

A. Not that I heard, no, sir.

Q. Your hearing was good?

A. Yes, sir.

Q. And he was close to you?

A. Yes, sir.

Q. And all the time when you signed there you knew the words were there, "this is correct," on each sheet?

A. Yes, sir.

Q. So that if such a sentence as I read is contained in that written statement, you did not say it to Mr. Bratager?

A. No, sir.

[fol. 415] Q. You did not say to Mr. Bratager that he did not tell you anything at any time about how the accident happened?

A. No, sir.

Q. Well, then, if it is in the statement Mr. Bratager wrote it in and concealed it from you, is that it?

A. Yes, sir.

Mr. Anderson: Yes. I offer Exhibit F in evidence in connection with this cross examination.

Mr. Palmer: No objection to it.

The Court: Received.

Q. Who interviewed you before you came here to testify at the last trial, the first trial, a year ago last September?

A. Nobody.

Q. Who, if anyone, talked with you about what you claim the facts to be in connection with this accident between the time of making the statement November 1st and the time you came to Bemidji September, 1921?

A. Nobody.

Q. With whom, if anyone, did you ever go over what you claim to be the detailed facts in connection with this accident between the time you made this statement and the time you testified here in September, 1921?

A. Why, a day or so before the trial in September, 1921, I talked with Mr. Palmer.

Q. Then did you ever talk with anyone about the detailed facts in connection with this accident between November 1st, 1920, and September, 1921, up to the time you talked with Mr. Palmer?

[fol. 416] A. Oh, possibly did. I didn't make any statement of any kind.

Q. No, but did you discuss the facts in the case during those ten months?

A. I don't remember.

Q. Well, what is your best recollection on the subject?

A. I don't know as I did, no.

Q. That is your best judgment, isn't it?

A. Yes, sir.

Q. Of course, in testifying now you remember what you said in 1921, don't you, in court?

A. Yes, sir.

Q. You have read over the record of your testimony before you went on the stand yesterday?

A. Yes, sir.

Q. Read it over carefully, didn't you?

A. Not very, no.

Q. Well, how carefully?

A. Just run over it the same as you would a newspaper, something of that sort.

Q. When did you go over it and read it?

A. A couple or three days ago.

Q. At whose request?

A. They asked me if I thought I was posted on the facts, the testimony I made before, and I told them I was and they thought I better read it over.

Q. Who were they?

A. Mr. Palmer.

Q. So you read it over, I suppose, either Monday or Sunday or something like that?

A. Yes, sir.

[fol. 417] Q. Read all of it?

A. Yes, sir.

Q. Read your cross examination?

A. Yes, sir.

Q. And between the time you testified in September until you read this record over, had you ever given any of these facts any thought, tried to keep them in your memory?

A. No.

Q. Goneau was unconscious when you went down under that bridge, wasn't he?

A. No, I couldn't say that he was, no.

Q. Was he partially unconscious, in your judgment?

A. I should say that he was irrational instead of unconscious when you come to find a definition of conscious.

Q. How irrational, what do you mean?

A. Well, I mean that he was suffering with great pain. I don't think he had presence of mind, although he was able to move

around. At times he talked all right and then other times, why, it didn't sound very good.

Q. Did you say anything in making the statement in November, 1920, about his being unconscious?

A. No, sir.

Q. Didn't mention that subject?

A. No, sir.

Q. You are positive of that?

A. Yes, sir.

[fol. 418] Q. That is, as you sit here now your memory is clear and unmistakable as to just what you said to Mr. Bratager and what you did not say?

A. After I testified here and the question was asked me a year or so ago or so or more, it come on my mind that I did not hear that or say it.

Q. That is, it came to your mind when you were cross examined a year and a half ago about this statement, that you did not say it?

A. Yes, sir, I don't think I said it as positive as I am now.

Q. You realize, of course, that this subject I am discussing is directly contradictory to what you have testified to here on the stand yesterday about his making a statement, you realize that?

A. Yes, sir.

Q. Is that the reason you say you didn't say it to Mr. Bratager?

A. No, sir.

Q. Then, to make it clear, Mr. Bratager, the claim agent, invented that sentence and wrote it without your knowledge?

A. Yes, sir.

Q. And Mr. Bratager, the claim agent, is the one, so far as you know, who had charge at the time, of investigating this accident?

A. Yes, sir.

Q. And when you gave this statement in November, 1920, was Mr. Bailey, the conductor there?

A. No, sir.

Q. Was the engineer there?

A. No, sir.

Q. Was the fireman?

[fol. 419] A. No, sir.

Q. Where did you say it was?

A. At the Belknap Hotel in Superior, 15th street, 1521.

Q. Were you in the lobby or up in a room?

A. Why, it was in the lobby.

Q. How did he take the statement, ask you a question and then write?

A. Yes, sir.

Q. Then asked you another question and then write?

A. Yes, sir.

Q. When this train stopped there that night in emergency you were riding in the engine?

A. Yes, sir.

Q. And you immediately got out of the engine and started east?

A. Yes, sir.

Q. On the north side of the train?

A. Yes, sir.

Q. And as you went along you looked in between each set of cars, is that it?

A. Yes, sir.

Q. Have any tools with you?

A. No, sir.

Q. You have tools on the engine?

A. Not a brakeman, no sir.

Q. Well, I mean the engineer has tools and the fireman?

A. Yes, sir.

Q. You know where they kept them?

A. Yes, sir.

[fol. 420] Q. And they have tools there to be used in case of emergencies, at times used by brakemen if they want them?

A. Such as wrenches, yes.

Q. Have monkey wrenches there on engines?

A. Yes, sir.

Q. That is one of the regulation tools, isn't it, on an engine?

A. Yes, sir.

Q. Rather large monkey wrench?

A. Yes, sir.

Q. Just like the monkey wrench you said you found on top of the car that night?

A. Yes, sir.

Q. By the way, did you say you saw a monkey wrench on top of the car?

A. Not that I recollect?

Q. You said you found a hose and one wrench?

A. Yes, sir.

Q. What did you say last September about the number of wrenches you found?

A. I said I found a monkey wrench, but since that time I don't know whether the wrench was there at the time I came there first or whether it was afterwards.

Q. You testified in September, last year, that there were two wrenches on the car?

A. Yes, sir.

Q. Were there?

A. I don't know positively whether there was at that time, but there was during this time sometime. It was not clear in my mind [fol. 421] whether it was since that time or not.

Q. Why is it that your mind is not clear now as to whether both wrenches were there when you first got to that point?

A. Well, after the trial I got to thinking about it.

Q. What made you get to thinking about it?

A. Well, I don't know what did make me think about it.

Q. Isn't it because somebody told you there was only one wrench there?

A. No, sir.

Q. Isn't it because Mr. Goneau testified positively he only had one wrench?

A. No, I didn't hear his testimony. I didn't know what he testified to.

Q. Isn't it because you realized afterwards that you yourself took that monkey wrench down there?

A. No, sir, I did not.

Q. And used it while you were down below there?

A. No, sir.

Q. That was a large monkey wrench, wasn't it?

A. Middle size, twelve or fourteen inch, possibly.

Q. Don't you know that it was a wrench that came from the locomotive engine?

A. No, sir.

Q. Do you know that it did not?

A. No, sir, it did not.

Q. Well, you say you got out and started back immediately.

[fol. 422] A. Yes, sir.

Q. And you got back altogether about eight cars, didn't you?

A. Well, I should judge ten or twelve car lengths.

Q. Well, it wasn't over ten cars, was it?

A. I don't know.

Q. And you walked right along?

A. I don't know but what I did. I might have stopped to fix up some minor leak in the train line or something. I can't tell anything about it.

Q. You can't tell whether you stopped to fix up some minor leak?

A. No, sir.

Q. Your memory is as clear as a bell as to everything that happened about Goneau?

A. On different things, yes, sir.

Q. Clear as a bell as to the number of signals?

A. Yes, sir.

Q. And where they came from?

A. Yes, sir.

Q. But you cannot tell anything about what you did walking that ten cars?

A. No, sir, I do not.

Q. Can't tell whether you walked fast or slow?

A. I imagine I walked right along.

Q. And don't know whether you stopped to fix some minor leak, as you call it?

A. No, sir.

Q. This train wasn't full of minor leaks, was it?

[fol. 423] A. No, but as a rule trains are—there is no train ever pulled out of a yard with seventy cars but what had some leaks in them.

Q. How many car lengths were you from Goneau when you say you saw the first back-up signal?

A. I don't know. It was a long distance, anyway.

Q. How many cars, in your best judgment?

A. I couldn't say how many cars there were. I wouldn't say.

Q. At any rate, you stopped west of the Omaha bridge?

A. Yes, sir.

Q. And when you walked along and reached that point is where you saw the first back-up signal given?

A. Yes, sir.

Q. And you saw that as soon as you reached that point, practically as soon?

A. Yes, sir.

Q. You may have stopped momentarily, that is all?

A. Yes, sir.

Q. Otherwise, you would have gotten up on top and gone over that bridge and down again, wouldn't you?

A. Yes, sir.

Q. You were not trying to waste time, were you?

A. Not that I know of.

Q. You knew 18 was coming, didn't you?

[fol. 424] A. Yes, sir.

Q. It appears here that the break in the train was about the middle or thirty cars from the caboose; you realize that, don't you?

A. Yes, sir, I heard it told afterwards.

Q. If you saw a back-up signal given as soon as you got to the Omaha bridge about ten cars from your engine and that signal was given by Goneau he had to get out of his caboose and walk up at least thirty cars to be where that signal was given, didn't he?

A. Yes, sir.

Q. And he would have to do that while you were walking eight or ten or twelve cars?

A. Yes, sir.

Q. You know from what you observed there that night that the draw bar on the east end of the west car as to the carried iron was broken down, don't you?

A. Yes, sir.

Q. And you knew it there that night?

A. Yes, sir.

Q. And you knew it before you went down to see where Goneau was?

A. Yes, sir.

Q. You knew it when you were there between the cars?

A. Yes, sir.

Q. And you knew the draw bar was down very badly?

A. Yes, sir.

Q. And you knew from what you observed and what you saw [fol. 425] before you knew Goneau was hurt, that is you were very certain that the train had broken in two, weren't you?

A. Yes, sir.

Q. And you knew when the first back-up signal was given, or you realized immediately after that that Goneau was bringing the two sections of the train together apparently to make a coupling?

A. Yes, sir.

Q. Can you account from what you remember and from all the conditions, for your not being able to move more than eight or ten cars while Goneau went thirty or thirty-five?

A. No, sir, only one way, I expected it was a busted hose. And we have no extra hose in the engine, have no wrench, and I have to go out and flag No. 18 and it was storming pretty bad and I didn't care much about walking on the train when it was moving.

Q. I wasn't asking you about walking on a train when it was moving; I am asking you why you only got eight or ten car lengths while Mr. Goneau got his tools and walked thirty or forty?

A. That is the reason, because I had to go out and flag No. 18, head in at Solon Springs and go out and flag No. 18.

Q. You didn't go out and flag No. 18?

A. No, because we was delayed too long.

Q. You immediately started back at the time, didn't you?

A. Yes, sir.

Q. Then explain why it is that you did not get up thirty or forty [fol. 426] car lengths?

A. I told you I didn't know what the reason was.

Q. You are a good walker, aren't you?

A. I must have had some delay somewhere.

Q. How is it your memory is so poor on that and so good on what Goneau did?

A. Because I don't recollect, but I don't see why I wasn't back further than I was. There must have been something delayed me.

Q. How high was that iron structure on the north side of the Omaha bridge from the level track up to the top of that big iron structure up there?

A. About four or five feet.

Q. Isn't it at least eight feet?

A. No, sir.

Q. How do you know?

A. Because I know.

Q. How often did you look at it?

A. I looked at it the next day.

Q. What for?

A. I just happened to look at it, that is all.

Q. Did you look at it with the idea of seeing how high it was?

A. No.

Q. Or how low it was?

A. But as I remember the road the iron itself is about eight feet high and it extends down about three feet below the top of the ties on the abutments.

Q. How wide is it, how thick?

[fol. 427] A. Oh, somewhere's twelve or fourteen inches.

Q. Isn't it two feet at least?

A. I don't think it is that wide, no.

Q. How much space between the side of your train and that iron structure?

A. Five or six feet, something like that.

Q. I want to show you a photograph, Defendant's Exhibit 2, do you recognize that picture, looking west in the picture is it the St. Croix River bridge?

A. Yes.

Q. What is that off in the distance on either side of the bridge, for instance, up there?

A. It appears like a bridge there, but you cannot say positively whether it is or not. It is too long a view to distinguish what it is.

Q. Anyway, it looks like a structure with two elevations on either side of the track, doesn't it? What is your best judgment, isn't that a picture of the Omaha iron elevations on either side?

A. Yes, sir, but it don't look very good. There is one a good deal wider than the other. You can't tell whether it is or not.

Q. Is there any other fixed structure except the track west of the St. Croix River bridge, or was there at that time?

A. Not that I know of.

Mr. Anderson: Do I need to put on a witness to show that is the Omaha iron sides?

Mr. Palmer: I suppose the witness wouldn't know any more about it than the picture shows.

Mr. Anderson: Well, you concede that is a west view?  
[fol. 428] Mr. Palmer: Surely. Absolutely.

Mr. Anderson:

Q. What are you doing now?

A. I am looking after the east side of the Park Falls Lumber Company's logging department.

Q. How long has it been since you railroaded?

A. Since that next trip I made after the accident.

Q. The 30th day of October, 1920?

A. Somewhere around that.

Q. Two or three days after this accident?

A. Made one trip after the accident.

Q. Never railroaded since?

A. No, sir.

Q. Were you discharged?

A. No, sir.

Q. Take all of your commercial railroading combined from the time you had that six months' experience on the South Shore, have you railroaded as a brakeman altogether enough to make it a year?

A. I think I worked a year for the South Shore, if I ain't mistaken or the Soo Line.

Q. A year when?

A. Not steadily, but I mean different times, the time I put in, maybe sometimes I would work thirty days, forty days, fifty days. Then I would be laid off again.

Q. What is the longest you ever succeeded in working on a railroad at one time?

A. I don't remember. It is too long ago.

[fol. 429] Q. During these many years have you been trying to get in as a railroad employe, brakeman? To make it your business?

A. No, sir.

Q. How did you happen to go to railroading so many times, then?

A. I thought some day I might want to hang onto my rights and whenever I would get a chance I would go back and go to work whenever they would call me in order to hold my rights.

Q. Have you got any rights left now?

A. No, sir.

Q. Did you have any rights left when you testified in September, 1921?

A. Yes, sir.

Q. You had hopes then of holding them, didn't you?

A. No, I didn't figure on holding them, but I still had rights.

Q. At that time you think you had given up hopes of being a railroad man?

A. Yes, sir.

Q. When this train broke in two that night you said something about flagging 18, didn't you?

A. Yes, sir.

Q. Nobody flagged 18 there at that time before you went and found Goneau was hurt?

A. No.

Q. The reason of that was that 18's time on the time card and your time there was such that you knew that 18 could not reach you?

A. Yes, sir.

[fol. 430] Q. No. 18 was due down there at about 7.23 that night, wasn't it?

A. I don't know.

Q. You knew then, didn't you?

A. No, I don't know as I did.

Q. Now, just think; do you want to be understood as testifying you didn't know at the time, that night, when 18 was due?

A. No, sir, I didn't.

Q. Why, didn't you have a time card?

A. No, sir, I didn't. I was just loaned from the Duluth-Superior Division over there to make a trip and they don't equip you with time cards and one thing and another. They don't even give you a key. You have to borrow one from the trainmen.

Q. You had never been over here before except one trip?

A. I had made one or two trips before that over the Chicago Division.

Q. You found out didn't you, that No. 18 was not due there for a long time after your train stopped in emergency?

A. No, the instructions I got that we head in at Solon Springs, that is all. I didn't know the time it was due there or anything.

Q. Of course, under a condition such as we have described, as long as you didn't have to go out and flag, one of your duties was to keep a look-out for signals from the rear and transfer them to the engineer?

A. Yes, sir.

[fol. 431] Q. This was a very dark night?

A. Yes, sir.

Q. And it was storming at the time considerably?

A. Yes, sir.

Q. Sort of sticky, heavy snow?

A. Yes, sir.

Q. Hard to see through it, wasn't it?

A. Well, not so much on the north side of the cars as it would be on the south side.

Q. The snow was coming from the south?

A. Yes, sir, somewhere in that direction.

Q. Ordinarily, where you have a long train and it is in a storm and your duty requires you to transfer signals, you do it from the top don't you?

A. Sometimes.

Q. Don't you, as a railroad man, stand where you know you can be seen up on top, where the engineer can see you?

A. Sometimes we do and sometimes we are on the ground. If we happen to be on the ground when we see the signals, we don't climb up on top to repeat them if we can see the engine.

Q. You do this where the engineer can certainly see you?

A. Yes, sir.

Q. And you do this where the man back at the rear giving the signals can see you?

A. Yes, sir.

Q. And ordinarily you do not place yourself so that an iron structure like the Omaha structure will be between your lantern and his do you?

[fol. 432] A. No, sir.

Q. But you were in that position that night, you claim?

A. I was at the west end of that bridge, but I didn't know I was hidden from him. I could see him plainly enough.

Q. You had to duck down between the train and the iron structure to see him?

A. Yes, sir, looked down through there.

Q. If you were down about ten cars and thirty cars from Goneau, how is it on that dark stormy night that you are so positive he was down below instead of on top when he gave signals?

A. We always know whether the signals are given from the top of the train.

Q. That isn't answering my question; I want to know how you can know under the conditions there that night?

A. I had the impression in my mind that he was there. That is the only place I thought he could be. That is the place I thought he was at.

Q. When did you think there is where he was?

A. At that time.

Q. Why did you think so?

A. Because I could see him working in between, going in and out between the cars, the same as you did anywheres.

Q. See him plainly, of course?

A. Yes, sir, you could see him plainly.

Q. The storm didn't bother you a bit?

A. Not there, no, sir.

Q. While you were walking down from the engine eight or ten [fol. 433] cars or twelve at the outside, and when you were not looking between, weren't you looking down to the tail end of your train to see what was going on down there?

A. Yes, sir.

Q. And from where you were up above the Omaha bridge clear down over the St. Croix bridge, the track was straight, wasn't it?

A. Yes, sir.

Q. Did you see Mr. Goneau walking up by the side of that train?

A. No, sir.

Q. Did you see his lantern swinging along or any sign of it?

A. No, sir.

Q. If you were on top of the train while he was walking up on the north side you couldn't possibly see the lantern, could you?

A. No, sir.

Q. And if you were on the ground and Mr. Goneau was on top when he gave the first back-up signal you could not see it, could you?

A. No, sir, unless he stood over the edge of the car.

Q. Well, you don't stand over at the edge of the car, do you, when it is rainy and snowy and slippery?

A. Sometimes you do if you have to give signals from there. You don't give them from the center of the car.

Q. Why not?

A. Because the engineer can't see them as well as from the out-[fol. 434] side.

Q. And if Mr. Goneau was down on the side of the car giving the signals and you were up on top west of the Omaha bridge, you couldn't possibly see a signal could you?

A. No, sir, unless he stood at the edge of the car, and give them.

Q. Goneau was on the St. Croix River bridge; he couldn't stand out, could he, very far?

A. No. He had to stand right close to the car.

Q. You understand from the testimony that the ties on this bridge at the time of the accident were twelve feet long?

A. Yes, sir.

Q. You understand that the gauge of the track is four feet eight and a half inches, don't you?

A. Yes, sir.

Q. Over the rails, substantially five feet, taking in the rails?

A. Yes, sir, somewhere about that.

Q. And you take the ordinary freight cars, they over-hang from two feet to twenty-seven inches, don't they?

A. They are all the way from nine foot on, I think, the width, so there would be about that.

Q. If they are nine feet there would be about a two foot over-hang?

A. Something like that.

Q. A nine foot car is understood to be a rather small car, isn't it?

A. I think it is.

Q. There would only be a foot and a half of the bridge left out-[fol. 435] side, wouldn't there?

A. Yes, sir, about that.

Q. So that if Mr. Goneau stood out there on that eighteen inch space to give signals he would have to hook himself in between the cars to get his body out there?

A. Yes, sir.

Q. His body is more than eighteen inches, isn't it?

A. Somewhere about that.

Q. And in order to give a signal there like what you said, the circle, he would have to have his hand out and give it standing on a narrow space of eighteen inches wouldn't he?

A. Yes, sir.

Q. And if a signal would be given there it would be out about as far as the iron structure on the Omaha bridge, wouldn't it, with his hand out giving that circle, back-up signal?

A. I don't know as it would. Wouldn't reach out five or six feet, I don't think.

Q. And when you were giving a signal back there what hand did you use?

A. I don't know.

Q. Have no recollection on the subject?

A. No, sir, I do not.

Q. Are you right-handed?

A. Yes, sir.

Q. Do you give signals with your right hand if you can?

A. Yes, sir.

Q. Could you that night?

[fol. 436] A. No, I don't think I could.

Q. Why not?

A. Because the cars were to my right.

Q. When you repeated a signal to the engineer did you stand facing east or west?

A. East.

Q. That is, facing Goneau?

A. Yes, sir.

Q. And so your hand when you were giving the signal with the left hand would be out away from your train?

A. Yes, sir.

Q. Now, a stop signal is down below, isn't it? Considerably lower down than the back-up signal?

A. Yes, sir.

Q. But the iron structure of the Omaha bridge did not obstruct your view a bit did it?

A. Not looking east, no.

Q. The first signal you saw back there was a back-up signal?

A. Yes, sir.

Q. And you immediately repeated it onto the engineer?

A. Yes, sir.

Q. Did the engineer immediately back up?

A. Why, about as quick as he possibly could, yes.

Q. And turned the wheels?

A. Well, a few seconds or so, as quick as I figured he could possibly do it, yes.

Q. Do you know anything about air brakes?

A. I know how they work in some instances. As far as to de-[fol. 437] scribe them, explain them, I don't know.

Q. Take the situation as it existed that night when your train stopped in emergency and assuming that your train had broken in two what set the brakes?

A. The air escaping.

Q. The air hose opened, didn't it?

A. Yes, sir.

Q. When and under what circumstances could the engineer release the brakes then on the front section of his train?

A. Until the angle cock was closed behind.

Q. That would be on the east end of the west car of that section?

A. No, it would be the east end of the east car.

Q. And after the angle cock is closed how quickly can the engineer pump air into the train line throughout his train of forty cars and reach the point where it releases the brakes?

A. That differs on the size of the pump and engines they have got.

Q. Well, on this pump and engine?

A. I don't know.

Q. Well, it takes several minutes, don't it?

A. Several minutes, as a rule.

Q. But it didn't wait several minutes, you claim, at this time after the first back-up signal?

A. I don't remember distinctly if there was any lapse of time there.

Q. How far did the train back on this first occasion?

A. I haven't the least idea. I didn't watch it, nor I couldn't [fol. 438] state how far they backed whether they backed one car or three cars, I don't know.

Q. Are you putting now a limit, somewhere from one to three cars, do you think?

A. No, sir I am not.

Q. What happened then?

A. The cars came together.

Q. How do you know they came together?

A. The slack was all taken up and the contact of the cars ran by me.

Q. Is that train standing there with the cars solidly up against each other before he backs?

A. I don't know. The slack might be run out and might not; might be up together.

Q. As your train is running along there that night twenty-five miles an hour is that slack out or in?

A. According to that emergency stop they would be out.

Q. As you are running along the slack is stretched out between each car, isn't it with a big seventy car train?

A. Well, sometimes, according to what the grade is, what the track is like.

Q. How was it there?

A. I don't know.

Q. Well, how in the world when you are running along twenty or twenty-five miles an hour could you imagine the slack not being stretched out?

A. Well, the slack runs in when it runs down hill.

[fol. 439] Q. Do the cars running back there drift up faster than the engine is running under steam?

A. Yes sir. Down hill it does.

Q. Well, your engine is down hill?

A. Yes, sir.

Q. The engine has got its power on?

A. Yes, sir.

Q. But the cars that are behind there, they just catch up?

A. They will just run in.

Q. Run faster than the engine?

A. Yes, sir.

Q. Was there a down grade here?

A. I don't know.

Q. Didn't the slack run in between the cars when the engine backed there that night that first backing up proposition?

A. Yes, sir.

Q. How do you know?

A. Because I heard the contact of the cars coming by.

Q. Car by car?

A. Yes, sir.

Q. Do you want to be understood as saying that you heard the two sections of the train come together afterwards?

A. No. I didn't hear the two trains coming together, only the contact as it came by me is what I heard.

Q. So that so far as you could tell from what you heard there on this first backing up proposition you didn't know whether the train was parted or not?

[fol. 440] A. Well, I didn't know, but I had an idea it was.

Q. When the couplers come together, you call that the impact. You didn't hear that?

A. Not at the hind end, no.

Q. Well, there wasn't any other break in the train?

A. No, sir. No, I didn't hear that.

Q. What signal did you receive shortly after the first back-up signal?

A. Stop signal.

Q. Did the engine stop then?

A. Yes, sir.

Q. You assume it did?

A. Yes, sir.

Q. You couldn't see the engine?

A. No, sir.

Q. But the train stopped where you were?

A. Yes, sir.

Q. Then you stood there?

A. Yes, sir.

Q. How long before anything else occurred?

A. Oh, a few seconds, half a minute or so.

Q. Just about long enough to enable Mr. Goneau to get down off from the car and step in and connect the air hose and open up the angle cock to the west of the opening just about long enough for him to step out and give you another signal?

A. No, I couldn't say he had time to do all that.

Q. It would not take a man more than half a minute to get down off the car and snap that coupler together and open the angle cock, would it?

[fol. 441] A. No, I don't think so.

Q. And get back up on top and give a signal?

A. Well, it would take him all of that to get down and up again.

Q. Then you got another back-up signal?

A. No.

Q. This is where you claim to have had a slack-ahead up and down signal?

A. Yes, sir.

Q. Sort of little pumping stroke?

A. Yes, sir.

Q. You could see that up there where you were on the ground?

A. Yes, sir.

Q. The Omaha bridge didn't interfere?

A. No, sir.

Q. And that was given down there off the surface of the bridge, was it?

A. Yes, sir.

Q. You know that?

A. Yes, sir.

Q. Although you were thirty car lengths away in the dark and storm, you want to be understood as being very positive just where the lantern was?

A. No; no, I don't.

Q. How positive are you on that subject?

A. I am not positive where the location of the signals were given from. I knew they were down below, but I didn't know whether on the bridge or on the fill.

Q. I mean surface of the bridge or surface of the ground, you are sure where it was?

[fol. 442] A. It was down below.

Q. What makes you so positive of that?

A. Because I could see it wasn't up in the air. If anything, it was as low as I was or a little lower.

Q. The accident was in October; you made this statement here November 1st, and you did not talk about these facts until September, 1921. How do you remember this thing about the height of that signal and know just where it was so definitely over this long period of time?

A. Because it made an impression on my mind where it was.

Q. But when the train backed up on the first back-up signal you haven't the least idea how far it backed?

A. No, because I didn't watch it.

Q. And you don't know whether you stopped and fixed any air hose on your way back from the engine that night?

A. No, sir, I don't know whether I did or not.

Q. But when it comes to the proposition of where Gonceau's signal was given you haven't any doubt about that, have you?

A. No, sir.

Q. And you didn't have at the time Bratager took your statement November 1st, did you?

A. No, sir.

Q. Had it in your mind then, didn't you?

A. Yes, sir.

Q. Did you and Bratager talk about Gonceau's signals being given [fol. 443] from down below rather than above?

A. Not that I know of.

Q. You did not volunteer that information?

A. No, sir.

Q. As a railroad man when you are making out a statement after an accident, aren't you expected and required to give every detail?

A. I tried to answer the questions, that was all.

Q. You got another back-up signal, back-up first, stop second, slack ahead third, back-up fourth, is that right?

A. Yes, sir.

Q. How far did the train move back in response to that last back-up signal, the fourth signal we are talking about now?

A. That is just as I told you before; I don't know how far it moved at either time.

Q. Might have gone back a car length or two cars or three cars, but you don't know anything about it?

A. No, sir.

Q. Weren't you interested in how far they backed up?

A. No, sir.

Q. When you got the second back-up signal what did you suppose it was for?

A. To make a coupling.

Q. What was the first back-up signal, in your opinion, for?

A. Couple up the train.

Q. Why would there be a second back-up?

A. Because he had slacked ahead.

[fol. 444] Q. You thought the thing had pulled in two again?

A. Yes, sir.

Q. The second back-up signal came very quickly after the slack-ahead signal, didn't it?

A. I can't say just how much time there was.

Q. At the time this was occurring you didn't know anything about any intentions of backing into Gordon to get out of the way of 18, did you?

A. No, sir.

Q. The train backed up a second time, anyway?

A. Yes, sir.

Q. And it never backed up more than the second time?

A. Not till they backed over the bridge.

- Q. I mean until this accident happened?
- A. No, sir.
- Q. That is right, isn't it?
- A. Yes, sir.
- Q. You heard Mr. Goneau testify it backed up twice, didn't you?
- A. Yes, sir.
- Q. It didn't back up the third time?
- A. No, until we backed it over.
- Q. In due time you got down to the scene of the accident, didn't you?
- A. Yes, sir.
- Q. You waited up there where you were quite a while?
- A. Yes, sir.
- [fol. 445] Q. After you got the second back-up signal and the train stopped, what was the next signal you got?
- A. I don't remember as we got any signal.
- Q. You mean by that you don't know whether you did or not?
- A. No, sir, I don't remember.
- Q. When was the next time you saw Goneau's lantern after the second back-up signal?
- A. A few seconds or a half a minute afterwards.
- Q. He gave the back-up signal and then the lantern disappeared in between the cars?
- A. Yes, sir.
- Q. How long did it stay there?
- A. Not very long. Long enough to couple up the air hose and open the angle cocks, in about that length of time.
- Q. How long did it take the train to back up in response to the second back-up signal?
- A. As I told you, I don't know.
- Q. Don't have any idea?
- A. No, I don't remember.
- Q. You don't know how long it took him to back up in response to the first back-up signal, do you, or anything about it?
- A. No, sir.
- Q. You don't have any idea how far the train backed up, either time?
- A. No, sir.
- Q. But as to how long Goneau was in between the cars after the second back-up signal you remember that definitely don't you?
- A. Not definitely, no, but as I remember it, it is about that length [fol. 446] of time.
- Q. About long enough to turn the angle cock and couple up the air hose?
- A. About what it takes us to do that work in.
- Q. When you go in to couple the air hose, you reach down, take them in your hands and reach up and snap them together?
- A. Yes, sir.
- Q. Then you reach and open the angle cock like that, don't waste any time on it?
- A. No, sir.

Q. Do the whole thing in two or three seconds?

A. Yes, sir.

Q. Then he came out again?

A. Yes, sir.

Q. He wasn't in there long enough, in your judgment, to do any work?

A. Not positive of it, no.

Q. He would not be in there, in your judgment, long enough to take hold of the carrier iron and brace himself and try to pull it over and then fall out?

A. Well, I would not say positively how much time there was elapsed there from the time he went in because I don't know.

Q. When you speak about remembering the time he was in there, have you in mind the thought that the time he was in was too short for him to do anything except to couple the air hose?

A. Yes, sir.

Q. That is what you had in your mind when you testified in September, wasn't it?

[fol. 447] A. Yes, sir.

Q. And when you testified in September you knew that Goneau claimed on that occasion he was pulling that carrier iron around, didn't you?

A. No, sir.

Q. And you know it when you are testifying here today, don't you?

A. Yes, sir.

Q. When the train backed the second time did you hear the cars down there where Goneau was, come together?

A. No, sir.

Q. Are you sure of that?

A. Yes, sir.

Q. Didn't you testify on the former trial that when he backed up the first time that you did hear the impact of the cars down there?

A. I don't know, sir, if I understood it that way.

Q. If you said it you didn't mean it?

A. If I said it, I did, it was the impact that went by me.

Q. How far did they back the second time?

A. I don't know.

Q. Any idea?

A. No, sir.

Q. Tell us about what you claim to have seen as to Mr. Goneau's lantern, now when he steps out the lantern comes out from between the cars after the second back-up?

A. The last time I saw it?

Q. Yes?

[fol. 448] A. Well, it just came out about that far from the cars. That is the last I saw of it.

Mr. Palmer: You are indicating about how much now?

A. Oh, about a foot and a half.

Q. About how far from the surface of the bridge because we all know where he was?

A. About three feet or three feet and a half high.

Q. Any motion or signal?

A. No, sir.

Q. It went out very quickly, very quickly?

A. Yes, sir.

Q. Just like a flash?

A. Yes, sir.

Q. You don't want to be understood as saying that the lantern stopped moving at any time when you saw it coming out?

A. No.

Q. In other words, what you saw was the lantern went in between the cars, remained out of your sight a little while and then suddenly came out somewhere up here three or three and a half feet high, you saw it just like a flash and it went out as though he had blown it out?

A. Yes, sir, exactly.

Q. You did not see that light fall down through that three and a half foot space at that time, did you?

A. No, sir.

Q. You didn't see it go down as though he had come out and stepped off the bridge and went down with it, did you?

[fol. 449] A. No, sir.

Q. And if it had gone down you would have seen it, wouldn't you?

A. I undoubtedly would. Of course—

Q. And that is the last time and then you went down and found Goneau below the bridge?

A. Yes, sir.

Q. And you say when you went there he said he stepped off the bridge, do you?

A. Yes, sir.

Q. And you say that the statement in this statement that he made no such statement was written there by Bratager, the claim agent and not with your authority?

A. Yes, sir.

Q. You came down and when you got to the place where you know this defective coupler was—you know where it was?

A. Yes, sir.

Q. You discovered it before you knew where Goneau was?

A. Yes, sir.

Q. You found an air hose and an S-wrench on the running board of the west end of the east car?

A. Yes, sir.

Q. Where you, as a railroad man, and where you would expect anyone to put it when you are finished with it and wanted to move your train, isn't that true?

A. Yes, sir.

Q. It was put back where it would not fall off?

A. Yes, sir.

[fol. 450] Q. You don't know how it got up there?

A. No, sir.

Q. You were watching him all the time and it would be impossible for Goneau to have gone up there with his lantern without your seeing the lantern?

A. Yes, sir.

Q. He couldn't have gotten up there, could he?

A. Not very handy unless he got up there before I saw him.

Q. Where were you when you heard the moan?

A. Standing between the two cars.

Q. You had gotten down?

A. Yes, sir.

Q. But while you were up there you heard an air hose leaking?

A. Yes, sir.

Q. Was it leaking when you got there?

A. Yes, sir.

Q. Did you hear it when you stepped over from one car to the other?

A. Yes, sir.

Q. Did you hear it before you stepped over?

A. Not that I remember.

Q. But as you were stepping over you heard it?

A. Yes, sir.

Q. Loud and distinct?

A. Yes, sir.

Q. A leak that you know would cause an emergency application of the brakes if the brakes were off when it started?

[fol. 451] A. No.

Q. It was not great enough for that?

A. No.

Q. It was not great enough to be a leak that came from the air hose that was not coupled?

A. No, sir.

Q. Sure of that?

A. Yes, sir.

Q. How much experience have you had in hearing the sound of the air hose from an uncoupled air hose when the angle cock is open?

A. Had enough to know the difference between the sound of a leak of a connection and an open air hose.

Q. You got down between the cars when you heard the moan?

A. Yes, sir.

Q. What had you done down there before you heard the moan?

A. Nothing.

Q. Didn't couple up that air hose?

A. No, sir.

Q. Did you find the angle cock closed, you say?

A. No, sir.

Q. Open?

A. Yes, sir.

Q. Was the angle cock open on the east section?

A. I don't know.

Q. Didn't look?

A. No, sir.

Q. You closed the angle cock on the west?

A. Yes, sir.

[fol. 452] Q. You testified the couplers were coupled?

A. Yes, sir.

Q. How do you know they were?

A. Because I seen them.

Q. Examined them?

A. I looked right at them, yes.

Q. Did you look at the carrier iron?

A. Not to examine it, but I looked at it and saw it was defective.

Q. Down, wasn't it?

A. Yes, sir.

Q. Those knuckles are nine inches, aren't they, up and down the knuckles?

A. Somewhere in that neighborhood.

Q. How much of that nine inches was against the other?

A. About half, possibly a little less.

Q. Were the knuckles locked?

A. Yes, sir.

Q. How do you know they were?

A. I don't know whether they were locked. They were in a position to lock; whether the blocks were down I don't know.

Q. How long did you stay there after you heard the moan before you took any steps to find out where it came from.

A. As quick as I found out where it was, I went immediately.

Q. It was after you heard the moan that you coupled the air hose?

A. I didn't couple no air hose.

Q. I mean that you turned that angle cock?

[fol. 453] A. I heard this moaning before I turned the angle cock off and this leak was making so much noise I couldn't distinguish where it came from, and I closed it and just as I closed it he let a loud moan out of him and I hollered to him and asked him if that was him and he said, "Yes."

Q. Before you hollered you took a gasket out of your pocket and fixed the air hose?

A. I had that in my mind when I was on top of the car and got down.

Q. Before you went down below?

A. Yes, sir.

Q. You testified here that you saw in the sand and the snow where he lit?

A. Yes, sir.

Q. Did you stop and examine so as to see where he lit?

A. No, not to make any thorough examination.

Q. Did you take your lantern and go along? It was very, very dark down there, wasn't it?

A. Yes, sir.

Q. Did you get down and examine to see where his body struck?

A. Where he was sitting I stood talking with him after I had got to him and I stood just about opposite where he fell and I could see the prints of him in the snow where he crawled around from there down to where he was sitting.

Q. When you went down there you found a situation that showed you that the man had lit upon a timber down there, didn't you?

A. Yes, sir.

[fol. 454] Q. Looked as though his shoulder or back struck right across a timber?

A. He struck it some way that way.

Q. You saw that?

A. He fell across that timber.

Q. And then after while he got up and slid down further?

A. Yes, sir.

Q. And then you saw him get up and walk over on the south side and sit on a log or something?

A. I wouldn't say for sure whether I saw him walk clear over there and whether he walked around under the bridge after he was sitting there at the bottom or whether he walked straight over there or not, but he was sitting. I was out looking for a board and I don't remember now whether he was there when I came back sitting up or whether he had walked while I was there.

Q. So you don't know whether you saw him walk over there or crawl over or how he got over?

A. No, I do not.

Q. You testified that Bailey came up?

A. Yes, sir.

Q. And that you saw his lantern coming down there along the train?

A. Yes, sir.

Q. Where were you when you saw his lantern?

A. I was standing right there alongside of Mr. Goneau.

Q. How far down was Mr. Bailey's lantern when you first saw it? Give it in car lengths east of the bridge?

[fol. 455] A. I couldn't tell you.

Q. On the last trial you estimated it something like twenty cars, didn't you?

A. Not that I know of.

Q. Well, was it that far, substantially?

A. No, it couldn't have been that far.

Q. Why not?

A. Why, I don't know, but it didn't seem on account of the time he took to get to the edge of the bridge; I shouldn't judge it would have been over five or six cars.

Q. You were down below where Mr. Goneau was sitting, had he slid down yet?

A. No, he hadn't slid down.

Q. And you say the place where he fell over was down below the

track twelve or fifteen feet, that is the way you estimated it at the former trial; that is about right?

A. Yes, sir.

Q. And where you found him sitting was about twenty feet below, wasn't it?

A. Something like that.

Q. So when you stood there you were twenty feet below the track?

A. Yes, sir.

Q. And of course the bank of the river over east there is twenty feet above where you were?

A. Somewhere in that neighborhood.

Q. Will you explain to the jury how you could look out where you are below there twenty feet and see a man down yonder that is five feet, ten inches in height and see him at all until he got right [fol. 456] down to the bank and looked down on you?

A. I don't know what the conditions are on the other side; might have been able to see farther than that, for that matter. Might have been a large fill there and he was walking at the bottom of the fill. I don't know what the conditions are there.

Q. Well, you were twenty feet down below the track, weren't you?

A. Not exactly.

Q. Fifteen?

A. Well, fifteen. That would leave about ten feet from the top of where I could see.

Q. All right, ten feet. The only way you could possibly see him was to have the thing cut down in some way so the bank of the river on the other side would not be above your eyes?

A. I don't know what the conditions are.

Q. At any rate, he came up there?

A. Yes, sir.

Q. After you had gone through certain things there, you went up and backed the train off the bridge?

A. Yes, sir.

Q. Then you wish to be understood as saying that you did not open the angle cock that you had closed?

A. Yes, sir.

Q. Who did open it?

A. Mr. Bailey opened it.

Q. You didn't know that Bailey opened it at the time?

A. No, sir.

[fol. 457] Q. So you thought you were backing that train up with the angle cock closed?

A. I didn't give it a thought at all.

Q. I mean when you testified here before you thought so, didn't you?

A. Not that I know of.

Q. Don't you remember trying to explain how you could back up with the angle cock closed?

A. Yes, sir.

Q. And in what way the engineer released the brakes on the rear thirty cars?

A. I don't know as the brakes set on the rear thirty cars.

Redirect examination.

By Mr. Palmer:

Q. What did you start to do after you quit railroading the last of October, 1920?

A. I bought a bunch of timber and logged it myself and sold the products.

Q. Did you buy the land, too?

A. No.

Q. You were not discharged, then, from the railroad service?

A. No, sir.

Q. Why did you quit the railroad service on October 30th?

A. I got into a collision up at Ironwood on October 5th and I came back to work on the 26th, I think it was, day of October, and I made two trips and I felt the effects of it, so I went up and saw the doctor and he told me I had better go home again.

[fol. 458] Q. And you never went back to work for the railroad?

A. No, sir.

Q. Do you ever expect to go back to work for the railroad?

A. No, sir.

Q. What is your work now?

A. I have charge of two of the company's camps and five locomotives, the steel crew and three loaders, steam loaders, what we call jammers for the Park Falls Lumber Company.

Q. Is that a large concern?

A. It is about the largest lumber company in the United States.

Q. And what is your position with them?

A. I would call it assistant superintendent over the east side of the river there.

Q. How long have you held that position of assistant superintendent?

A. Since the first of this year.

Q. And prior to that what did you do for them?

A. I went to work for them early last fall and ran camp for them somewhere in the early part of the season and before that I was doing some farm work and odd jobs with a team.

Q. Did you buy a farm?

A. Not at that time. I owned some land there east of Iron River, four miles and a half.

Q. Where does your family live?

A. They live in the village of Iron River.

Q. So that when you made this statement to Mr. Bratager on November 1st, 1920, you had quit the service of the railroad?

A. That is when I went home, yes, sir. I went home that afternoon, if I remember rightly.

Q. And you say this was taken in the Belknap Hotel.

A. Yes, sir.

Q. Did you give any more information than to answer the questions that were asked you by Mr. Bratager?

A. No, sir.

Q. Take this statement that you made at that time on November 1st, 1920. "I was head Breakman on Train No. 43, engine 474, on October 27th, 1920, when Brakeman Goneau was injured by falling off St. Croix River bridge near Gordon, Wisconsin," you made that statement?

A. Yes, sir. I don't remember what engine it was, but I knew at that time.

Q. "Regarding the accident I will state as follows: We were running about twenty-five miles an hour," is that your recollection of what you said?

A. Yes, sir.

Q. "And I was riding in the engine?"

A. Yes, sir.

Q. "When the train suddenly parted about fifty cars back?"

A. Yes, sir.

Q. "We had hold of seventy cars and when the train parted it set the air automatically and the train came to a stop?"

A. Yes, sir.

[fol. 460] Q. You said that?

A. Yes, sir.

Q. "I got out immediately when the train stopped and started back to see what was the matter?"

A. Yes, sir.

Q. You made that statement?

A. Yes, sir.

Q. That is correct, is it?

A. Yes, sir.

Q. "The part of the train that had parted was then standing on the St. Croix bridge?"

A. Yes, sir.

Q. "Brakeman Goneau who was on the rear end closed the angle cock;" did you know that he had closed the angle cock?

A. Well, I don't remember, no.

Q. But in order to move the front section of the train what was it necessary to do?

A. Close the angle cock.

Q. What for?

A. So as to give the engineer a chance to pump up his train line and release his brakes.

Q. So you say here, "Brakeman Goneau, who was on the rear end, closed the angle cock;" that would be the angle cock on which section?

A. Be on the west section.

Q. The front section?

A. Yes, sir.

Q. "Closed the angle cock and gave a signal to back up," that is correct, is it?

A. Yes, sir.

[fol. 461] Q. And it is what you said at that time?

A. There is only one he read there I don't remember. That is as to whether Goneau closed the angle cock. I don't remember saying that. Might have said so.

Q. Well, would the angle cock have to be closed?

A. Yes, sir, it would have to be closed.

Q. "This signal was given to connect up the train again?"

A. Yes, sir.

Q. "In going back I walked on the engineer's side?"

A. Yes, sir.

Q. That is correct is it? "And I saw the lighted lantern back there and I knew Goneau was working there?"

A. Yes, sir.

Q. Then did you make this statement: "Then Goneau gave the engineer the signal to go ahead?"

A. Then he backed up.

Q. No, I have already read that part of it?

A. That was the second signal I got.

Q. "Then Goneau gave the engineer the signal to go ahead?"

A. Yes, sir.

Q. Is that what you mean by this slack-ahead signal?

A. Yes, sir.

Q. "Then he swung him down?"

A. Yes, sir.

Q. What do you mean by that expression, "swung him down?"

[fol. 462] A. He gave him the stop signal.

Q. "I then saw him go in between the cars?"

A. Yes, sir.

Q. Who do you refer to there?

A. I am referring to Mr. Goneau.

Q. "I then saw him go in between the cars and then came out and swing him back again?"

A. Yes, sir.

Q. What did you mean by that, "swing him back again?"

A. Give him the back-up signal.

Q. "I then saw the lantern come out and disappear?"

A. Yes, sir.

Q. That is what you said, was it?

A. Yes, sir.

Q. "I was quite a distance from him even at this time and could see nothing but the light from his lantern?"

A. Yes, sir.

Q. "I would estimate that I was about thirty-five car lengths or more away from him;" that was your estimate at that time?

A. I don't remember.

Q. "I waited for a little while then and when I did not see any more of him, I started back," is that correct?

A. Yes, sir.

Q. "When I got where he had been I heard him groaning and discovered he had gone over the side of the bridge?"

A. Yes, sir.

[fol. 463] Q. That is what you said at that time?

A. Yes, sir.

Q. "I went down to where he was immediately?"

A. Yes, sir.

Q. Did you say that, "He was unconscious when I found him?"

A. I don't remember of ever saying that.

Q. You don't remember of saying that. What was his condition, Mr. Rocheleau, when you got down there?

A. His condition was that the man was in terrific pain and his movements I think were forced from the conditions he was in. Otherwise, I would say he didn't have his right sense. He was knocked out to some extent.

Q. But you don't mean to say that he was like a man asleep?

A. No, sir, he was not. He wasn't unconscious. I didn't stop to think of the definition of it, I guess.

Q. This part of it: "He was unconscious and I did not hear him say how it happened at any time after the accident?"

A. Yes, sir.

Q. What do you say about that?

A. I didn't say that. I didn't answer that question at all because I had it in my mind all the time that they had forgot about asking me that afterwards. I thought of that afterwards.

Q. Then did you know that this statement was in here in this way when you signed the statement?

A. No, sir, I did not, no recollection of it at all.

[fol. 464] Q. Referring to the former trial, did you get here at all until after Goneau had given his testimony?

A. No, there was one doctor, I believe, testified after I got here.

Q. Then you did not hear Goneau's testimony on the other trial at all?

A. No, sir.

Q. Did you know when you testified about what he had testified to or what he claimed?

A. No, sir.

Q. You say you talked with me before you went on the stand?

A. Yes, sir.

Q. Do you recollect my calling your attention to this part of your statement—do you recollect whether you told me at that time that Goneau told you that he stepped off the bridge?

Mr. Anderson: Objected to as immaterial, not proper re-direct examination as to what he told you and hearsay and self-serving and everything else.

Mr. Palmer: Well, you went into it.

Mr. Anderson: Oh, no, I didn't go into it. I didn't ask him what he said to you.

The Court: Objection sustained.

(To which ruling defendant excepted.)

Q. And did I at that time, Mr. Rocheleau, call your attention to this part of your statement?

A. Yes, sir.

Q. And did you say at that time, "I don't care anything about [fol. 465] what is in that statement, that is the truth?"

Mr. Anderson: Objected to as incompetent, irrelevant and immaterial, not proper re-direct examination, self-serving.

The Court: Objection sustained.

(To which ruling defendant excepted.)

Q. Continuing with this statement: "The conductor was coming up and I told him what happened," that was what you said, was it?

A. Yes, sir.

Q. "The conductor then went back to the hind end of the caboose and we backed the train up?"

A. Yes, sir.

Q. "The coupling had made when Goneau swung the engineer back just before he fell," did you say that?

A. I don't remember as to that. I didn't know anything about it. I must have misunderstood him or there is something wrong there. I don't know.

Q. But when you got back there?

A. Oh, when I got back there I knew the coupling had been made, yes, sir.

Q. Did you find the coupling made?

A. Yes, sir.

Q. What about the air hose?

A. The air hose was coupled up.

Q. "We backed over the bridge, we cut the engine off and went over the bridge again?"

A. Yes, sir.

Q. "Goneau was in such extreme pain that we could not carry him out and we flagged No. 18 about twenty-five minutes later and the [fol. 466] passengers assisted in carrying him out?"

A. Yes, sir.

Q. "We then set 50 cars of our train on the passing track and made a quick run into Superior with Goneau?"

A. Yes, sir.

Q. "I noticed when I was back where Goneau had fallen over that the drawhead was down about three inches," did you say that?

A. Yes, sir, if I remember right, I did.

Q. Was that your observation at that time?

A. Yes, sir, about half of it connected.

Q. "I had no chance to make a careful examination as about that moment I heard groaning down below," did you say that?

A. Yes, sir.

Q. And that is correct?

A. Yes, sir.

Q. "At the time he fell over he was standing on the bridge," did you say that?

A. Well, I don't know as I knew whether he was standing or what he was doing.

Q. You could see nothing but the lantern?

A. That is all I could see at any time. Whether he was standing or sitting I don't know.

Q. "There were no sides to the bridge, just ties sticking out?"

A. Yes, sir.

Q. "As far as I could see, the train was handled properly and when he went over the bridge the train was standing still?"

A. Yes, sir.

[fol. 467] Q. "This is correct. F. X. Rocheleau?"

A. Yes, sir.

Q. Could you see this lantern all the time while you were standing in your position west of the bridge, while it was outside of the cars?

A. Yes, sir.

Q. And at any time, Mr. Rocheleau, did you see the lantern go up on top of the cars?

A. No, sir.

Q. Or come down from the top of the cars?

A. No sir.

Q. The girders on this Omaha bridge, they run how with reference to the rails?

A. They run parallel with them.

Q. About what distance from the rails?

A. Between four and six feet, something like that, quite a space.

Q. And about how wide is the girder?

A. Twelve or fourteen inches, possibly a little more than that.

Q. And looking, as you say, right alongside of the car, the space inside the bridge, that interferes with your view at all?

A. No, sir.

Q. Of this matter?

A. No, sir.

Q. When you got back there to where you heard this leak you were where at at that time?

A. On top of the cars.

Q. Why were you on top of the cars?

A. To get over the St. Croix bridge.

[fol. 468] Q. When you got down below there did you close this angle cock?

Mr. Anderson: Objected to as repetition. He went all over that yesterday.

The Court: Objection overruled.

A. Yes, sir.

Q. Why did you close the angle cock?

A. With the intention of fixing it so that I could see where this sound was coming from.

Q. Was there enough noise made by this escaping air so that it interfered with your locating or hearing this sound?

A. Yes, sir, it did.

GEORGE BARNABY, on behalf of defendant, duly sworn, testified as follows:

Direct examination.

By Mr. Palmer:

Q. What is your full name?

A. George Barnaby.

Q. Where do you live, Mr. Barnaby?

A. Superior, Wisconsin.

Q. How long have you lived there?

A. About three and a half years now.

Q. Where did you live before that?

A. Ashland, Wisconsin.

Q. And how long did you live there?

A. Thirty-five years.

Q. How old are you?

A. Forty-four.

Q. A man of family?

A. Yes, sir, three boys.

[fol. 469] Q. What is your business?

A. Locomotive engineer.

Q. How long have you been a locomotive engineer?

A. Since June 10th, 1910.

Q. And prior to that time?

A. Employed as a fireman.

Q. How long were you a fireman?

A. I started in January, 1900.

Q. By what company were you employed?

A. At present by the Soo Line.

Q. How long have you been working for the Soo Line?

A. I don't exactly remember what date the Soo Line bought the Wisconsin Central, but since that date.

Q. Has all of your railroad service been either with the Central or with the Soo?

A. Yes, sir.

Q. On what division or run do you work?

A. On the Northern Division.

Q. Running between what points?

A. Ashland, south as far as Stevens Point, west to Minneapolis and up this way to Superior.

Q. How long have you been on those runs?

A. I put in about twenty years between Ashland and Stevens Point and about three and a half years between Superior and Ladysmith.

Q. So in October, 1920, what run did you have?

A. I was working between Superior and Ladysmith.

Q. What kind of service, passenger or freight?

[fol. 470] A. At that time it was on freight.

Q. You are on passenger service now?

A. Off and on when there is a case of emergency, yes, sir, passenger.

Q. How long have you been doing passenger runs in case of emergency?

A. My last passenger run was on the 15th of last month.

Q. And the rest of the time?

A. Freight.

Q. Mr. Barnaby, were you the locomotive engineer on this freight No. 43 at the time of this accident, on October 27th, 1920?

A. Yes, sir.

Q. Time freight?

A. Yes, sir.

Q. Going from Ladysmith to Superior it is numbered 43?

A. 43.

Q. Where did you start from that day?

A. Ladysmith.

Q. About what time?

A. We started to work about dinner time and I don't exactly remember what time we left there. I haven't got my time book with me. Sometime about one, I should judge.

Q. Did you do some work before you started?

A. We done some switching and picked up some cars before we made our main line connection.

Q. Was your train ready on the main line except for some cars you picked up?

A. We had to wait for another train coming in. The train that [fol. 471] came in we took in addition to the cars we had picked up in our yard.

Q. Did you take their engine?

A. No, sir, we have regular engines on the northern division.

Q. What number engine did you have that day?

A. That day I had engine No. 474.

Q. Did you take the caboose the other crew had?

A. No. The same caboose we have all the time.

Q. On the trip from Ladysmith to Gordon did you make any stops?

A. We stopped at Wiergor for water. Our next stop was at Stanbery for coal and water and the last stop was where we broke in two.

Q. Did you stop anywhere to let a passenger train go by, Mr. Goneau spoke of that?

A. If I remember right they were in the clear at that time.

Q. You did pass a mixed train?

A. Passed mixed train No. 30.

Q. Do you remember what point that was?

A. I don't just quite remember what point it was where we passed them, but they were in the clear on that day.

Q. So you went right on?

A. Yes, sir.

Q. Tell us about this breaking in two, where was it?

A. The cars parted right at the St. Croix river bridge.

Q. Near what station?

A. Gordon, west of Gordon.

[fol. 472] Q. About how far west of Gordon is this St. Croix river bridge?

A. It is a little better than a mile west of Gordon.

Q. Do you remember how many cars you had in that train?

A. Seventy cars.

Q. Does that make a long train?

A. Yes, sir, it does. Depends on the length of the cars.

Q. Yes, but ordinarily the cars will run about what?

A. Between thirty-eight and forty feet, an average run of cars.

Q. What called your attention to the breaking in two?

A. The brakes applied on the train.

Q. What caused that?

A. The train had parted, air hose had uncoupled.

Q. Why does that cause the brakes to set?

A. Takes the air out of the brake cylinders.

Q. What kind of a stop do you call that?

A. Nearly an emergency stop.

Q. Did that emergency stop apply to both sections of the train?

A. Yes, sir, it would.

Q. About where was the engine when you stopped?

A. It was going on the down grade west of the St. Croix river bridge, west of all bridges.

Q. Do you remember what other bridges there are west of the St. [fol. 473] Croix bridge?

A. There is two bridges there. I don't just remember. There is one a county road crossing and then the Omaha and then the St. Croix river bridge. The St. Croix river bridge is the third one to the east.

Q. Have you any idea how far the engine was from the St. Croix river bridge?

A. About forty-five cars.

Q. You say the engine was down grade?

A. Just tipping over the grade.

Q. What is the grade as you come into Gordon?

A. It is kind of down hill.

Q. And across this St. Croix river bridge?

A. There is an elevation there to go over the Omaha.

Q. That is kind of up grade again?

A. Up-grade, yes, sir.

Q. Then which way does she go?

A. Goes down grade again.

Q. So this Omaha bridge is about where with reference to the grade?

A. Right in the highest point of all the bridges, about the peak of the grade.

Q. Did you make any stop at Gordon?

A. No, sir.

Q. About what speed were you making?

A. About twenty-five miles an hour.

Q. Who composed the train crew?

A. The engine crew was myself, Fireman Manchester. Brakeman Rocheleau on the engine. On the caboose was Conductor Railey [fol. 474] and Brakeman Goneau.

Q. After you broke in two and the engine stopped, will you tell us what was done then, as you remember it?

A. The first thing that I done I shut the throttle off and looked back and waited for a signal, until somebody come up and shut the angle cock.

Q. Could you tell when the angle cock was shut?

A. Yes, sir.

Q. How could you tell that?

A. I looked at the hands on the air gauge and could see air starting pumping up back in the train again.

Q. Do you start to pump it up or does it pump up automatically.

A. It pumps up automatically.

Q. That is the first thing you noticed was that the angle cock had been shut back there somewhere?

A. Somewhere.

Q. Could you tell where?

A. No, sir, I could not. I could tell within fifteen cars from the engine, yes, sir, by actual experience. It was away back anyhow. I knew it was back towards twenty-five or thirty cars at least.

Q. You could tell that?

A. Yes, sir.

Q. After the angle cock was shut what happened?

A. The first signal I got was a back-up signal.

Q. Where was head brakeman, Rocheleau?

A. I got the signal from the hind brakeman, from the hind signal, [fol. 475] Mr. Goneau's signal.

Q. How soon after the stop did he get off the engine?

A. He got off as soon as he could, immediately.

Q. And which side of the train did he start back on?

A. My side, the right side.

Q. And did you get any signals to see about how far back?

A. Why, I didn't get a signal then for about ten or fifteen minutes. He must have walked between fifteen and twenty cars; that far and maybe further.

Q. And then what was the first signal you got?

A. A back-up signal.

Q. Who gave you that?

A. I got this signal from both men at once. I seen both lights to back up.

Q. Could you see Goneau's light?

A. Yes, sir.

Q. You could and also Rocheleau's?

A. Yes, sir.

Q. And you got the back-up signal from both of them?

A. From both of them. That is the only signal I got from both men.

Q. Where were those signals given from?

A. They were given low, down low.

Q. Were they given on top of the cars?

A. No, sir.

Q. Could you distinctly see them both?

A. Yes, sir.

Q. Could you tell anything about the distance between them?

[fol.476] A. They must have been about fifteen or twenty car lengths apart.

Q. Tell us what you did when you got this back-up signal?

A. I whistled three whistles first to back up and then I immediately started to back up.

Q. What are those three whistles?

A. To back up, three short whistles.

Q. How far did you back?

A. I just watched how far, and I backed up about three cars, 100 feet.

Q. Then what occurred?

A. There was a little hesitation then for a minute or so; then I got a slack-ahead signal from the head man, from the first light.

Q. Slack-ahead signal?

A. Slack ahead.

Q. Will you tell us how that is given?

A. Just a little pause up and down.

Q. What does that mean?

A. They just want a little bit ahead.

Q. And for what purpose is that usually given?

A. For different purposes. Sometimes if a coupling hasn't made, they want to get in between to make the coupling or sometimes to see if the coupling had made, sometimes to stretch out the train and see if there would be any leaks in there in the couplings, different reasons.

Q. Is it different from a start out and go-ahead signal?

A. It is just about half way from a go-ahead signal.

[fol. 477] Did you see Gonceau's lantern give that signal?

A. Not that there one. Just saw the head brakeman.

Q. Where was that given from?

A. From the ground.

Q. Did you slack ahead?

A. I slacked ahead.

Q. And how far, would you say?

A. Couldn't have been more than two or three feet.

Q. Then what happened?

A. The head man swung his lantern across the track. That meant stop.

Q. Where was that signal given from?

A. From the ground.

Q. And did you stop?

A. Yes, sir.

Q. Then what happened?

A. The next signal I got was a back-up signal.

Q. Who gave that?

A. The head brakeman.

Q. Where from?

A. From the ground.

Q. And what did you do then?

A. I backed up.

Q. About how far did you back up then?

A. About two or three feet, as far as I had went ahead.

Q. Then what?

[fol. 478] A. There was a pause. Then I didn't get any signals, then, for I should judge about fifteen minutes. I didn't time him. I didn't look at my watch. I knew how much time I had to go to Solon Springs and I thought maybe they were doing some work there. I didn't know what was going on. I should judge about fifteen minutes before I got any more signals at all.

Q. Did you move the train at all during that time?

A. No, sir.

Q. When you backed up that last time did you feel the cars come together?

A. Yes, I felt the last car when it hit the engine.

Q. After that last impact was made, could you tell anything about the air, did you observe anything about the air?

A. Why, the air wasn't cut in then for maybe a minute or two, two or three minutes.

Q. Then was it cut in?

A. The air was cut in on the back section of the train.

Q. What would that mean as to the connection of the air hose?

A. That the air was right through the whole train then.

Q. And did it pump up the whole train?

A. Of course, it would take some time to pump up seventy cars. I started to pump up, yes, sir.

Q. The air hose all connected up, that means that the train was ready to go?

[fol. 479] A. No, we waited there. It didn't take very long to pump up and I kind of thought it was queer, that somebody must have turned the angle cock again.

Q. After that?

A. After the air was cut in once there was a little hesitation here and then the air pump got it up quick and I knew that the hind section had not been pumped up then.

Q. You knew that someone had shut off the angle cock again?

A. Well, there was something went on there.

Q. Then after this long pause of ten or fifteen minutes, what happened?

A. I seen somebody going down on the river bank, under the bridge. I seen one light going down and looking back I seen another light going down and they both come up and I seen one light disappearing towards the hind section of the train. Then there was a little pause, say maybe a few minutes space to give that man time to get towards the hind portion of the train and I got a signal from the head man to back up.

Q. Where was that given from?

A. From the ground.

Q. And whereabouts?

A. Right about near the bridge some place.

Q. This light you saw disappearing towards the hind end, where was that, on top of the cars or on the ground?

A. There are three more bridges to cross over. He could get up on top or get down, of course, in order to get over those bridges.

[fol. 480] Q. Then when you got this final back-up signal from the head man what did you do?

A. I backed over the St. Croix river bridge until I got across the bridge and he got on the side of the engine, in the gang-way there, and he said, "We will cut off the engine."

Q. Who said that?

A. Mr. Rocheleau, the head man. "We will cut off the engine, cross over the bridge and pick up Goneau." He had fell down below.

Q. Did he cut the engine off?

A. Mr. Rocheleau did.

Q. Then what did you do?

A. We went across the bridge with the lone engine.

Q. Who went on the engine that time?

A. The three of us were together then. Myself, the fireman and the head brakeman, Mr. Rocheleau.

Q. Then what did you do?

A. Crossed over the bridge, got over the bridge and I took my torch and I was the first one of the three that went down below. The other two followed me down below because I had a torch, could see better.

Q. Yes.

A. And I could see places down there and the lantern and where he had fell. I got down close to the river and seen him leaning in a sitting position up against a pile.

Q. Who?

[fol. 481] A. Mr. Goneau.

Q. What happened then?

A. I asked him, "What is the matter, Ernie?" And he was in a kind of a dazed condition there and he said: "I slipped and fell."

Q. He said what?

A. "I slipped and fell."

Q. Did you say you saw his lantern?

A. On my way down, yes, sir.

Q. Where did you see it, Mr. Barnaby?

A. It was sunk in the sand down there. It wasn't quite where he fell, a little up towards the bank more than where he fell.

Q. Could you see the place where he had fallen?

A. Yes, sir, I could see the tracks.

Q. Which side of the bridge was he on when he was sitting down by that piling?

A. He was on the east side, on the right side of the bridge; that would be on my side of the train.

Q. Did he change his position afterwards?

A. Mr. Rocheleau and I suggested that we wanted to carry him up and, if I remember right, Mr. Goneau, I don't remember just quite right, said, "I can't be moved; I am in such pain," so we were going to put him on the fireman's back and Mr. Rocheleau and I were going to help the fireman up and Mr. Rocheleau says, "I don't think it could be done," so I sent Mr. Rocheleau over towards the county road to tear a plank off the county road bridge, and he got over there and while he was over there Mr. Manchester and I brought him over towards the west side of the bridge in a drier place to sit down.

[fol. 482] Q. His lantern, when you saw it further up on the bank, as you say, was that out?

A. It was out. Sunk in the sand.

Q. Did Rocheleau get the board?

A. He come back and the time was getting short then. I told him to stay with Goneau. I told the fireman to couple me up first to the train. We coupled up to the train and I sent him out to flag No. 18 and I stayed with the hind portion.

Q. Who stayed with Goneau?

A. Mr. Rocheleau.

Q. The fireman went out to flag 18?

A. We were getting close to their time, and he went out to stop them.

Q. Which way did he go?

A. Towards the west.

Q. What did you do with the engine?

A. I started to get the steam up again. By that time the steam had went down, water was getting down low. I started to get it ready to back up the train.

Q. Did you go back and couple onto the train, did you say?

A. We had done that before Mr. Manchester had went out to flag.

Q. What happened next, Mr. Barnaby?

A. Mr. Manchester went out and flagged 18 when 18 come along. He waited for them and he notified them that there was somebody hurt and the train crew or somebody off of that other train took a stretcher and went down and picked him up. Mr. Manchester then came over to me and by that time I got a signal from the hind end [fol. 483] to back up.

Q. Where did you back?

A. We backed up towards Gordon. I don't remember whether we backed up on the main line or the passing. We backed up, anyhow. I think we went up on the main line and 18 went through the passing track, if I remember right.

Q. Was there room on the passing track for you to set your whole train?

A. Not for our train, no.

Q. How many cars, about, could you put on the passing track?

A. It only holds fifty cars.

Q. And your recollection is that No. 18 went by on the passing track?

A. The engine backs over the switch, 18 gets in the passing track and we pulled by and 18 goes right through.

Q. What process do you call that?

A. Sawing by.

Q. And after 18 had passed, what was done next?

A. We set out as many cars as the passing track would hold which would be fifty cars and in order to save time stopping any other place we took the other remaining twenty cars with the caboose and went up to the depot, picked up Goneau and hurried into Superior.

Q. That last time when you finally backed off the bridge did you have any trouble backing up?

A. In the meantime somebody had cut in the air, didn't have no [fol. 484] trouble; the hind end was pumped up by that time.

Q. After the air was shut off?

A. Somebody cut in the angle cock the second time. There was two men went down to see Goneau.

Q. Yes?

A. Two men come up, one come up first and he done something there and then he went towards the hind end and then after that there was a pause of about, I should judge, ten or fifteen minutes. Then we backed off the bridge.

Q. So he had cut it in before he started for this hind end?

A. Yes, sir.

Q. And then you pumped up the whole train?

A. Yes, sir.

Q. Did you have any trouble backing off the bridge?

A. It was a little grade there, that is all; might have been a few brakes stuck on the hind end. I don't know.

Q. But you did back off the bridge all right?

A. We did back off the bridge.

#### Cross-examination.

By Mr. Anderson:

Q. Did you make a written statement shortly after this accident?

A. One or two days after; I don't remember how long.

Q. To Mr. Bratager?

A. Yes, sir.

Q. He took it away with him, I suppose?

[fol. 485] A. I don't know what he done. I just made the statement.

Q. I mean you didn't keep it?

A. No.

Q. He took it with him?

A. He must have.

Q. Coming down to the time the train stopped in emergency, I think you said the St. Croix river was a mile or better out of Gordon?

A. About that.

Q. Then your engine was a mile and a half or better out of Gordon; I mean forty or forty-five cars more?

A. It isn't half a mile long. Forty cars isn't half a mile.

Q. When you say "better," you mean it is at least a mile to the bridge?

A. Just about.

Q. It was a dark night, wasn't it?

A. Very dark.

Q. And snowing?

A. Not so bad that you couldn't see anything at all.

Q. It was snowing, I said?

A. It was.

Q. Of course, you could see your hand before your face?

A. Oh, certainly.

Q. It wasn't dark enough but what you could do that?

A. Certainly.

Q. It was snowing some there that night before you backed up [fol. 486] over the bridge, so that you could not see down along that train very far, wasn't it?

A. It was snowing all the time we was there.

Q. Didn't it snow a little harder after you got your first back-up signal?

A. No, it did not.

Q. Didn't you testify on the former trial that after the first back-up signal it snowed hard and you couldn't see down as far as the St. Croix bridge?

A. It was snowing about the same all the time.

Q. Didn't you so testify? Don't you remember?

A. I don't remember.

Q. For instance, I will call your attention and see if you can remember it, on page 623, folio 1868. You have already testified that you got the first back-up signal before I am reading this, as you say, it was on the ground down low anyhow. "Question: Are you sure they were both down low? Answer: Yes, sir." Those were those two first signals, of course; the signal ahead was transferred, wasn't it?

A. Yes, sir.

Q. "Question: What did you do? Answer: I backed up kind of hard and I come to a stop, swung me down, and then after that I started taking signals from the head man; snowing too bad; I couldn't see the hind man any more." Do you remember now of so testifying?

A. Why, I must have testified to that, then.

Q. Well, then, it was true, wasn't it?

A. Must have been.

Q. So that the conditions there that night very quickly after the [fol. 487] first back-up signal were such that you could not see back to the St. Croix river bridge, and could not see a lantern?

A. I seen the first signal, two men.

Q. I say after that signal?

A. The storm wasn't any worse then than it was before.

Q. You testified on the last trial, "snowing too bad; I couldn't see the hind man any more?"

A. I paid more attention to the head man. He was closer to me.

Q. What did you mean by saying, "It was snowing so bad I couldn't see the hind man any more?"

A. I don't know. I suppose I meant that I wanted to watch the head man. Could see him more plainly.

Q. So in order to express that you made the statement under oath the last time it was snowing so hard you couldn't see the last man any more; by that you meant you were not looking for him, is that it?

A. I paid more attention to the head man.

Q. You are familiar with air brakes?

A. Yes, sir.

Q. And when you backed up in response to the first signal I think you stated you think you went back a hundred or a hundred and twenty feet?

A. About three car lengths.

Q. What was there fixing your attention so that you have in mind the measurement so as to be able to tell two years or more afterwards how far you backed up?

[fol. 488] A. In my last statement the last trial it was the same thing, two and a half, if I remember right.

Q. That fixed it in your mind so that in September, 1921, you said you backed two or three car lengths; how did you happen to remember it ten months after the accident? What was there when you backed up that fixed the distance in your mind?

A. By experience, we know just how far we back up or go ahead. I can set down and shut my eyes and know if I back two or three cars.

Q. Well, you were practically in the same position as if your eyes were shut there in the dark night, were you not?

A. No.

Q. How could you measure the distance?

A. I knew just how far the engine traveled. I could tell by the movements of the engine.

Q. Assuming you had forty cars in your train at that time back to the separation, and you got that first back-up signal taking into consideration everything that happened there before, how far would your engine have to move back before the fortieth car would move?

A. I don't know. The engine moved about three car lengths.

Q. How far back would you have to push your engine and the other thirty-nine cars in order to move the fortieth car?

A. About three car lengths.

Q. Three car lengths before the rear end would start at all?

[fol. 489] A. Before—I am talking about coupling the train together.

Q. How far would your engine have to move before the farthest, the fortieth car would begin to move?

A. In that case the slack would be all out of the train. I don't suppose maybe a couple of feet.

Q. The slack would be out between each set of cars, wouldn't it?

A. Yes, sir.

Q. And you think your engine would move about two feet to close up all that slack?

A. About that.

Q. Assuming the couplers are in ordinarily good condition, how many inches of slack with each draw bar? If they are in good, first class condition, three inches, isn't it, with each draw bar?

A. I never paid no particular attention to that. I know what it is on the engines. I don't know anything about cars.

Q. You know there is about six inches of slack between each set of cars, don't you; that is, when they are stretched out?

A. I don't think there is that much.

Q. How long have you railroaded?

A. Since 1900.

Q. And you know that between forty cars your slack would amount to about twenty feet, don't you?

A. No, I don't think it would.

Q. At any rate, you would have to push the slack all in before the last car would move, wouldn't you?

A. Yes, sir.

[foy. 490] Q. And that makes quite a bit of noise, doesn't it?

A. It does a little, yes.

Q. It backed hard that night the first time you backed, didn't it?

A. Yes, sir.

Q. And even with forty cars in your train if your slack was all bunched when you wanted to back, you would have to stretch out the slack some to start back?

A. Not with that class of engine.

Q. It was a big, powerful engine, was it?

A. Compound, yes, sir.

Q. Compound doesn't refer to the strength of an engine, does it?

A. It refers to the strength in starting a train, yes, sir.

Q. When you backed up there that night, you say two or three car lengths, what happened then?

A. I got a signal to stop then.

Q. That was a signal given by one man?

A. By the head man.

Q. And that is the time when you say because it was snowing so hard, you couldn't see back to the bridge, isn't it?

A. I was watching the head man more.

Q. And you stopped?

A. Yes, sir.

Q. And in connection with that backward motion that time do you know whether you struck against any section of your train that had been separated?

[fol. 491] A. We struck the hind end the first time.

Q. How do you know you did?

A. I felt it.

Q. What did you feel?

A. The engine and cars bumped up against each other.

Q. Did you feel it when your slack run in on your thirty-nine cars bump up against the fortieth car?

A. I felt the engine when I hit the last car right next to me, I heard the compact come up.

Q. I notice you said that when the engine hit the car next to the engine?

A. Well, it keeps hitting from one car to the other.

Q. But your slack was all in as you backed up there, wasn't it?

A. Yes, but there is a compact.

Q. You heard the impact, did you?

A. Yes, sir.

Q. Plainly?

A. Yes, sir.

Q. But the impact forty cars from you I am talking about?

A. I didn't hear that one, no.

Q. In order to know that you came in contact with the part of your train that was separated you would have to hear it, wouldn't you?

A. Why, you couldn't go any further.

Q. Is that the reason you stopped?

A. I got a signal to stop.

Q. You couldn't go any further, anyway, could you?

[fol. 492] A. No, sir.

Q. You knew that from the way your train acted, didn't you?

A. Yes, sir.

Q. So when you run against thirty or forty cars with the brakes set in emergency you can't budge them, can you?

A. No, sir.

Q. After you had done that how much time passed before you got the slack ahead signal?

A. I didn't time it just exactly. I should judge it wasn't very long.

Q. Minutes or two minutes?

A. I don't know how long it was.

Q. You said you slacked ahead how much?

A. I slacked ahead again a few feet.

Q. Well, how many feet?

A. Two or three feet; maybe more. Not more than six.

Q. If you slacked ahead six feet it would not have the slightest effect upon the position of the fortieth car back from you, would it?

A. Yes, sir.

Q. How could it have it you have slack between each of the thirty-nine cars that you have to pull out when you slack ahead?

A. I must have separated the cars because they went in between them.

Q. Who went in between them?

A. It must have been Goneau.

Q. You can go between cars when they are coupled, can't you?

[fol. 493] A. Certainly.

Q. You don't have to pull the slack out to get in between, do you?

A. They generally pull the slack if they want to do any work. I just obeyed signals.

Q. And that is just about all you know about this, isn't it? When

you talk about slacking ahead six feet, do you want this jury to understand that you have the slightest idea today, over two years after that accident, how far your engine moved ahead that time?

A. I don't think it moved any further ahead. I read my last testimony over.

Q. When you swear here today that you slacked ahead six feet, are you trying to repeat from memory what you said in September, 1921?

A. As far as I can remember, I am trying to repeat the truth, the same thing.

Q. Are you trying to repeat what you said before, from memory?

A. As much as I can recollect with memory and with that book.

Q. You can't separate them now? You can't tell whether you are remembering the original fact or whether you are remembering what you read?

A. I ain't trying to separate them.

Q. You remember better, don't you, what you read this week, better than what happened over two years and a half ago?

A. No, sir, not any better.

Q. If you had not read it in the book that you testified in September [fol. 494] about six feet, do you have the least idea what your testimony would be now?

A. I don't remember what the distance is in the book right now.

Q. Don't you know as an experienced engineer that if you backed that train up, as you say, two or three car lengths and made an impact against cars that were locked, don't you know that if you slacked your engine ahead six feet it would not pull the slack out of more than twelve cars?

A. It can be done.

Q. Don't you know with first class couplers there is about six inches of slack between every set of cars?

A. We do it daily. We pull the slack out of trains daily and I don't move further than six feet at any time with forty and fifty cars, every day.

Q. Well, we will leave it at that. When you had the slack-ahead signal you got another back-up signal, didn't you?

A. Yes, sir.

Q. How far did you back that time? Don't tell us from memory of what you read in this book, tell us the fact?

A. About the same distance, six feet.

Q. Could it have been seven?

A. I just guessed at it, six feet.

Q. Couldn't it have been twenty?

A. No.

Q. Why not?

A. Because the engine didn't move that far.

Q. How do you know it didn't? Tell this jury the reason you [fol. 495] know these things?

A. By actual experience.

Q. You haven't got it your mind the fact that Goneau said you backed up about twenty feet and you are trying to contradict him?

A. I didn't hear his testimony this time. I don't know how far he did say he backed up.

Q. You heard it in September, 1921, didn't you?

A. Not the first part of his testimony.

Q. You heard him testify as to the distance you backed up that second time, now, didn't you?

A. I don't remember I did.

Q. You know that he has testified on the second backing up that he had succeeded in coupling the train and he was backing again into Gordon, don't you?

A. The second time he backed up?

Q. Yes, sir, you know that, don't you?

A. I know the train was together and the air was coupled up.

Q. You know the train was together when you made your second back?

A. The air was coupled up.

Q. No, you have just said you knew your train was together when you made the back-up the second time; you have just said so; do you mean it?

A. The train was backed up the second time and the air was cut in after we slacked back.

Q. After you slacked ahead, you mean?

Mr. Palmer: No after he slacked back.

A. Slacked back and then coupled up.

Mr. Palmer: Don't change his testimony.

[fol.496] Mr. Anderson: I am not changing his testimony.

Mr. Palmer: You did change his testimony.

Mr. Anderson: You just take your exceptions and otherwise keep still.

Q. You have just said when you backed up the second time you know that your train was coupled up together; do you mean it? Now, answer that question and not something else.

A. Do you want me to go through the same thing again?

Q. I want you to answer my question. When you backed up the second time you said the train was coupled up; now, do you mean it or not?

A. The air hose was.

Q. They couldn't couple up the air hose without the train being coupled up?

A. I backed up the second time—

Q. I am going to ask you again: When you backed up the second time was your train coupled up or not?

A. The air was coupled up. It must have been coupled up.

Q. All right. And that is the last time you backed until you backed off the bridge?

A. Until I backed off the bridge.

Q. You got a stop signal after that second backup, didn't you? That is the reason you stopped?

A. Yes, sir. I got a signal then from the head man.

Q. Are you sure you got a stop signal after you made the second back-up?

[fol. 497] A. Well, the air was cut in then and I had to stop.

Q. And when you say the air was cut in, don't you mean it is when you backed up there the second time that the train stopped again because the brakes set?

A. Yes, sir.

Q. So that means to you that after you backed up the second time the train broke in two again and stopped you, didn't it?

A. No, sir.

Q. What do you mean by saying the brakes were set when you backed up the second time?

A. The train wasn't broke in two the second time.

Q. How do you know it wasn't?

A. Because the air started to pump up and pumped up slow and somebody shut the angle cock again.

Q. Somebody shut the angle cock after you backed the second time?

A. Yes, sir.

Q. What happened before he shut the angle cock with your air?

A. I had a full pressure of air then.

Q. Why would there be any pumping up of the air when the angle cock was shut?

Mr. Palmer: He didn't say so. I want to take exception to that distortion of this witness' testimony.

The Court: Well, the witness can correct it himself if he didn't say it.

[fol. 498] Q. Didn't you say that after you backed up the second time and stopped that you could tell that the air was cut in or the angle cock closed because the pump began to pump up slowly?

A. I mean that when it coupled up the second time. When they coupled up after my slow back-up signal that I had the air in the first portion then of the train and the air was cut into the last portion then.

Q. When?

A. After the slack back signal, after I had stopped.

Q. You have used two expressions here that you didn't use on the direct examination; first you say the slow back-up signal; this is the first time I have heard of a slow back-up signal?

A. That is the second time we backed up.

Q. What is a slow back-up signal?

A. Slack back.

Q. The other is slack ahead?

A. The other is slack ahead.

Q. Have you ever mentioned before just now that you got a slow back-up signal?

A. I said a back-up signal.

Q. A back-up signal is one thing and a slack-back is another, isn't it?

A. I knew I didn't have to back up very far.

Q. After you backed the second time what happened to your air?

A. The air was cut in on the last portion of the train.

Q. How do you know it was?

A. I could tell by the hands on the air gauge.

[fol. 499] Q. What were you looking at when you backed up the second time?

A. I was looking at the head man.

Q. Where did you look then?

A. After the stop I didn't get no signal; then I looked at the air gauge. I could tell when the air was applied.

Q. Then you didn't get another signal for how long after?

A. I didn't time it. Didn't take very long.

Q. You want to be understood as saying that sometime you knew the angle cock was closed on the head portion?

A. At all times until I had it backed up.

Q. You want to be understood as saying that you could tell that the entire train was not being backed up the second time?

A. Yes, sir, could not back them up.

Q. Why not?

A. The air was set on the hind portion.

Q. How do you know it was?

A. I knew they didn't have time to bleed all those cars.

Q. How much time was there between the first back-up and what you call the slack ahead signal?

A. It wasn't very long. Not over a minute or two.

Q. And how much time between the slack ahead signal and the next back-up signal?

A. About two minutes.

Q. Four minutes altogether?

A. About a minute or two minutes apart.

[fol. 500] Q. You were watching them carefully?

A. Yes, sir.

Q. Keeping it in your mind?

A. Yes, sir.

Q. Haven't forgotten it since?

A. No, sir, never will.

Q. How long did it take you to pump up the air in your entire train when the brakes were set in emergency?

A. The angle cock on the last section of the train wasn't left long enough to pump the whole train. It takes about a pound a second to pump up a train.

Q. Seventy pounds?

A. About that.

Q. Seventy seconds?

A. About that. Sometimes a little sooner.

Q. Say, for instance, here is your train seventy cars, brakes went on in emergency; that lets all the air out of your train line, doesn't

it? How long will it take you then, everything coupled up, to pump it up? Seventy seconds, isn't it?

A. We usually average about that, but there is leaks.

Q. Let's make it 120 seconds; that is enough, isn't it?

A. That would cover it, two minutes, easy.

Q. You say there was two minutes' time between the time you first backed up and you got the slack ahead signal, is that right?

A. Well, about a minute or two.

Q. Well, you said two?

A. Well, I will say two.

[fol. 501] Q. That gave you plenty of time to pump up the air through the entire train, didn't it?

A. The hind section wasn't cut in yet.

Q. It gave you plenty of time, didn't it?

A. Yes, sir.

Mr. Palmer: Was that answer taken? The answer was the hind section wasn't cut in yet.

Mr. Anderson: That wasn't an answer. That was volunteered.

Q. Why are you so positive that the back end wasn't cut in at the time you backed up the second time?

A. I got a back-up signal or a slack back, whichever you want to call it and then the air was cut in the last section.

Q. When?

A. When we slacked back or backed up, as you want to call it.

Q. You mean after you backed up?

A. After the second signal.

Q. How do you know it wasn't cut in then?

A. Why, by actual experience we can tell whether we have got twenty cars or forty cars and they keep cutting in cars. When there is more cars cut in the brakes apply on the whole train as you keep cutting in more cars.

Q. Here we have forty cars; you have certainly got your air all coupled up there on the forty cars, haven't you?

A. Yes, sir.

Q. That means that the angle cock at the rear end of your forty cars was closed shut?

[fol. 502] A. Yes, sir.

Q. That railroad track from the Omaha bridge east to the St. Croix bridge was down grade, wasn't it?

A. A little bit.

Q. If the slack in your forty car train was in, as you stated, with the angle cock open, with the brakes set in emergency like when you broke in two, and then you closed the angle cock the automatic pump would be working and the air would pump into your train line then, wouldn't it?

A. Yes, sir.

Q. I suppose you had your valve on release, of course, under those circumstances?

A. Yes, sir. Running position.

Q. When you were standing there after you were set in emergency?

A. We always leave the brake valve in running position so they can find, in case an air hose is broken find where the leak is.

Q. You would have to put it in release position in order to release the brakes?

A. They would release automatically if they would pump up.

Q. When the angle cock is closed it pumps up, your pump is working?

A. Yes, sir.

Q. As the air would pump in the brakes would release?

A. Yes, sir.

Q. And under those circumstances, the cars that stood on the [fol. 503] down grade would settle back to the east until the slack ran out, wouldn't they?

A. There wasn't enough grade for that.

Q. Have a tendency to, at any rate, according to the grade?

A. Not on that grade.

Q. How much is the grade?

A. I never measured it, but it isn't very much anyhow.

Q. Well, it goes up a little there so as to go over the Omaha bridge?

A. It is a long hill.

Q. But it is up-grade for that purpose, so as to get over the Omaha bridge?

A. Yes, sir.

Re-direct examination.

By Mr. Palmer:

Q. Do you know about how far you were beyond the Omaha bridge?

A. Why, I don't quite remember how far it is between them bridges, fifteen or twenty cars; might be that. I don't swear to it. I don't just quite remember.

Q. Then from the Omaha bridge down to where your engine was standing which way was the grade?

A. Why, the engine was pointed towards down grade and the back of the train was farther up.

Q. Then from the Omaha bridge down to your engine was down grade?

A. Yes, sir.

Q. After you made the second back up the air was cut in the hind section, could you tell that?

[fol. 504] A. Yes, sir.

Q. How?

A. Why, the brakes would apply on the engine and on the forward section of the train. You could hear them applying and you could tell by the pump working faster, too.

Q. Why would the brakes set on the engine and the front section as soon as the air was cut in on the hind section?

A. That would be taking air out of the brake cylinders going into the rear section.

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PRICE M. MANCHESTER, on behalf of defendant, duly sworn, testified as follows:

Direct examination.

By Mr. Palmer:

Q. What is your full name?

A. Price M. Manchester.

Q. Where do you live?

A. I have made my headquarters at Stevens Point. My folks live at Oxford, Wisconsin.

Q. Are you a married man?

A. No, sir.

Q. How old a man are you?

A. Twenty-six.

Q. What is your business?

A. Locomotive fireman.

Q. How long have you been a locomotive fireman?

A. Since August 18th, 1917.

Q. What age did you start?

[fol. 505] A. Twenty-one.

Q. By what company are you employed?

A. By the Soo Line.

Q. How long have you worked for the Soo Line?

A. Five years the 18th of last August.

Q. Since you have been railroading, all your railroading has been done for the Soo?

A. Yes, sir.

Q. And on what division do you work?

A. On the Chicago division.

Q. Between what terminals?

A. From Stevens Point to Ashland and branches out of there, Stevens Point to Superior and Stevens Point to Minneapolis.

Q. Freight or passenger?

A. Freight.

Q. This run between Ladysmith and Superior, do you work on that?

A. I did. I worked on those shifts for about fifteen months.

Q. About when was that, Mr. Manchester?

A. I don't just recollect, but I think I went up there in December, 1919.

Q. And in October, 1920, were you on that run?

A. Yes, sir.

Q. And were you fireman on this train No. 43 at the time of this accident?

A. Yes, sir.

Q. Who was your engineer?

A. Mr. Barnaby.

Q. And the conductor.

A. Mr. Bailey.

[fol. 506] Q. The head brakeman?

A. Mr. Rocheleau.

Q. And the rear brakeman?

A. Mr. Goneau.

Q. Do you remember about what time you left Ladysmith?

A. No, sir.

Q. Do you remember anything about the stops from the time you left Ladysmith?

A. No, sir, I don't remember any of the details of the trip until we had the accident.

Q. What is the first thing you remember about the accident?

A. Well, the air going on automatically and stopping.

Q. About where was that?

A. Well, we had went over all the bridges at Gordon and started on the down grade west of there.

Q. Towards Superior?

A. Yes.

Q. About how far west of Gordon do you think you were?

A. I think the engine just lacked a few car lengths of being a mile from Gordon, from the mile board.

Q. You say you were on the down grade?

A. Yes, sir.

Q. About where does the grade begin to go down with reference to these bridges?

A. I don't remember exactly, but I think from the Omaha bridge [fol. 507] that the grade breaks there and goes each way.

Q. When the train broke in two and stopped where were you?

A. I was on the engine.

Q. Do you recollect what you were doing?

A. Why, I don't just remember, but I was doing some work in connection with firing the engine.

Q. Your place is on which side?

A. On the left side.

Q. And the engineer on the right side?

A. Yes, sir.

Q. That would bring him on which side as you went west?

A. Bring him on the north side.

Q. And you were on the south side?

A. Yes, sir.

Q. And was there somebody else in the engine?

A. Mr. Barnaby and Mr. Rocheleau.

Q. What part of the engine was he in, do you know?

A. If I remember right, he was on the seat box with me when the brakes set.

Q. After the brakes set, what did he do?

A. He got off the engine.

Q. How soon after the engine stopped did he get off?

A. Just immediately afterwards.

Q. And where did he go?

A. I couldn't say.

Q. You didn't watch him?

A. No, sir.

Q. What is the next thing that you noticed?

[fol. 508] A. We stayed there for quite a long time and didn't make any move and I stepped over to the engineer's side and looked back and just as I stuck my head out between the cab and the back we got a back-up signal and I turned around and Mr. Barnaby whistled to back and started to backing up and I started putting in fire.

Q. Was that the first movement you had made?

A. Yes, sir.

Q. This back-up signal, did you see that given?

A. I seen one back-up signal.

Q. How was that given, in what way?

A. With a lantern.

Q. How many lanterns did you see?

A. Just the one lantern.

Q. And that was who?

A. I don't know.

Q. How far back was it?

A. I should judge about fifteen cars or so. I saw the back-up signal.

Q. Where was that given from Mr. Manchester?

A. Must have been given from the ground or the side of the car. From the position I was when I looked out between the tank and the engine I couldn't have seen that signal unless it had been given on the ground or the side of the car.

Q. Could you have seen it had it been given from the top of the car?

A. No, not the place where I was.

Q. Then what happened?

[fol. 509] A. We backed up.

Q. Could you say anything about how far he backed up?

A. No, sir.

Q. Did you hear the cars come together?

A. No, sir, I don't recollect.

Q. What did you do after you had this first back-up signal?

A. I turned around and threw some coal in the engine because it was rather a hard place to back up. I figured it would move rather hard.

Q. And did you see any further signals given?

A. No, sir.

Q. Do you remember anything about the further movements?

A. No, sir, not until I remember him backing over the bridge when Mr. Rocheleau told us that Goneau had fallen off the bridge after we had backed over the St. Croix river bridge.

Q. Did you see any more signals given after this first back-up signal?

A. No, sir.

Q. And do you recollect anything about the movements of the train after that until you backed off the bridge?

A. No, sir.

Q. Then when you backed off the bridge you saw Rocheleau?

A. Yes, sir.

Q. Where did you see him first?

A. He was on the right side of the engine and I had stepped over [fol. 510] there after we stopped across the bridge and he told us Goneau had fell into the river.

Q. Where did he get on the engine?

A. On the east side of the bridge.

Q. After he told you about Goneau falling, what was done?

A. We cut off the engine and we went across the bridge to the other side.

Q. Who went across with the engine?

A. Mr. Rocheleau, Mr. Barnaby, the engineer and myself.

Q. What did you do then?

A. We went down to Mr. Goneau.

Q. What is the first thing you remember?

A. The first thing I remember was seeing Mr. Goneau partly propped up against one of the piling down underneath the bridge.

Q. Do you recollect which side he was on?

A. He was on the north side of the bridge.

Q. Did you have any talk with him, do you remember anything that he said?

A. I asked him how bad he was hurt or something of the kind and he said he was hurt pretty bad.

Q. Who was there?

A. Mr. Barnaby and Rocheleau and myself.

Q. Then what happened next that you recollect?

A. We tried to study out some way to carry him up and take him [fol. 511] back to Gordon, get him out of there. I tried to carry him and that hurt him. I thought we might get him on my back and the two of them, with the other man's help, we might get him up that way, but that didn't work and we was looking around for a plank or board to get him on and didn't find any. In the meantime 18 was coming close. It was pretty near due and somebody suggested that we wait until eighteen come with a stretcher and I went up on the engine to fix it up so it would be all right until I got back, throwed in a fire and Mr. Barnaby come up on the engine. Then we backed over the bridge and I cut in the air and took the flagging tools and went out and flagged 18.

Q. Where did you leave the engine as you went out to flag?

A. On the east side of the bridge.

Q. You had connected it up with the train?

A. Yes.

Q. Where did you go to flag 18?

A. Went west over the bridge out half or three quarters of a mile. It was straight track for several miles there.

Q. How did you flag?

A. With a fuse and lantern. I put out a torpedo and walked back and flagged them with a fuse, and they got up to me and I got on the engine and told them what had happened.

Q. Then what occurred?

A. Pulled up to the bridge and the conductor and the brakeman and myself and I think a lineman from Ladysmith or Superior was [fol. 512] one of the men that went down with us and helped carry Mr. Goneau up.

Q. What did you carry him on?

A. On a stretcher.

Q. Where did you get the stretcher?

A. Out of the baggage car on 18.

Q. Where did you put him after you carried him up?

A. Put him in the baggage car.

Q. Then what was done?

A. 18 started to pull down towards the Gordon depot. We pulled down quite a little ways and our train was standing down there on the main line and backing up or trying to and when we got down across the bridge I jumped off of 18 and ran down and got on my engine so I could be on the job while he was backing up and sawing by.

Q. And then what did you do?

A. I think we backed up the main line and let 18 on the passing track and pulled ahead and let them go around us. Then we set out part of our train on the passenger track at Gordon, all that the passing track would hold and then pulled up to the depot and got Mr. Goneau and highballed for Superior.

Q. Where did you put Goneau?

A. In the caboose.

Q. When you went down there under the bridge did you see anything of Goneau's lantern?

A. Yes, I seen the lantern.

Q. Where did you see that?

[fol. 513] A. Well, it was lying on the ground because I was the man that picked it up, but I couldn't say just the location of it now.

Q. Was it where he was sitting?

A. I couldn't answer that. I don't know.

Q. Was it lighted or out?

A. It was out.

Q. With reference to the sand there, did you observe anything about it as to that?

A. No, sir, I can't remember anything about that.

Q. Do you recollect whether or not the lantern was broken or not?

A. The lantern was bent, yes, sir, and the globe was broken, if I remember right.

## Cross-examination.

By Mr. Anderson:

Q. How tall are you, Mr. Manchester?

A. About five feet ten and three-quarters, I think.

Q. Shoes on or off.

A. On.

Q. How high is the deck of your cab from the rails?

A. It is about a little over six feet, probably seven feet on an engine.

Q. The deck is the floor of your cab where you stand?

A. Yes, sir.

Q. Did you have your head out of the window or in the gangway?

A. In the gangway.

[fol. 514] Q. Standing on the deck?

A. Yes, sir.

Q. Out where that grab-iron is, looking up?

A. Yes, sir.

Q. Your head was about somewhere eleven or twelve feet above the ground?

A. Something like that.

Q. How high are box cars, how do they run?

A. From the rail to the top of the car?

Q. Yes?

A. I don't know.

Q. According to the size of the car, running from eleven feet to thirteen and fourteen feet, aren't they, about?

A. Something like that.

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SYLVESTER H. BAILEY, on behalf of defendant, duly sworn, testified as follows:

## Direct examination.

By Mr. Palmer:

Q. What is your full name?

A. Sylvester H. Bailey.

Q. They usually call you Sam don't they?

A. Generally, as a rule.

Q. Where do you live?

A. I have been making my home at Superior. Previous to that I called Stevens Point my home.

Q. How old are you?

A. Thirty-three.

Q. Have you a family?

A. No, sir. I have a father living at Ashland. I have no [fol. 515] mother.

Q. What is your business?

A. Railroad conductor.

Q. How long have you been a conductor?

A. Since June 5th, 1913.

Q. And prior to that time?

A. I was a brakeman.

Q. How long were you a brakeman?

A. Since October 8th, 1908.

Q. And before that?

A. Before that I held a job as a brakeman on the Omaha for a year or so.

Q. Since 1908 by what company have you been employed?

A. By the Soo Line.

Q. All the time for the Soo Line?

A. Yes, sir.

Q. You are a licensed conductor, passenger or freight service?

A. Largely freight service.

Q. You have done some passenger service?

A. Very little.

Q. What are you doing just at present?

A. At present I am in the freight service.

Q. On what divisions of the Soo Line do you work?

A. Between Ladysmith and Superior.

Q. How long have you had that run?

A. I have been on there off and on for five or six years.

Q. Mr. Bailey, were you the conductor on this freight No. 43 at the time of this accident?

[fol. 516] A. Yes, sir.

Q. Time freight?

A. Through freight, we call it.

Q. Stop at small stations?

A. No, sir.

Q. And one of these where they stop along, what do they call those?

A. That is a way-freight or local freight.

Q. You started from Ladysmith?

A. Yes, sir.

Q. About what time did you leave Ladysmith?

A. We were ordered about noon and we left there shortly after noon, between one and one thirty.

Q. Mr. Bailey, do you keep a record of just when you do leave; what do you put in it?

A. My train book.

Q. What is a train book?

A. A record that you put in the initials, number and contents of cars; also keep the record of the leaving time and arriving time of your train and also keep a little record of delays and happenings throughout the trip.

Q. You put it down at the time?

A. Yes, sir.

Q. Who keeps that train book?

A. The conductor.

Q. I show you this book, Defendant's Exhibit 8, what is that?

A. Train book.

Q. Whose?

A. Why the Soo Line, the Soo Line Railroad Company.

[fol. 517] Q. When they are filled what do you do with them?

A. I turn them into the car service department at Minneapolis.

Q. Can you look at that book and tell me who made the entries in it?

A. Myself.

Q. The date of this accident was——

A. Was October 27th, 1920.

Q. Have you an entry as to your train?

A. Yes, sir.

Q. Does that show the exact time that you did leave Ladysmith?

A. Yes, sir.

Q. What was it?

A. 1:10 P. M.

Q. Does it show the number of the train?

A. Yes, sir.

Q. 43?

A. No. 43.

Q. Show the number of the engine?

A. Yes, sir.

Q. What is that?

A. Engine 474.

Q. Does it show the conductor?

A. Yes, sir.

Q. That is your own name, I suppose?

A. S. H. Bailey.

Q. And the engineer?

A. George Barnaby.

Q. And the head brakeman?

[fol. 518] A. F. X. Rocheleau.

Q. And the rear brakeman?

A. E. J. Goneau.

Q. Does it show the fireman?

A. It does not.

Q. Does it show how many cars you had in the train.

A. Yes, sir.

Q. And the numbers and initials of all of them?

A. Yes, sir.

Q. And can you tell us how many cars?

A. Seventy cars.

Q. Does it show how many loads and how many empties?

A. Yes, sir.

Q. How many loads?

A. Eleven loads and fifty-nine empties.

Q. Does it show the stops that you made before this accident?

A. No, sir, it doesn't show any stops.

Q. You don't put that down?

- A. Some men do. I don't or never did.
- Q. Do you recollect about the stops?
- A. Yes, sir, I do.
- Q. How many did you have before you had this accident?
- A. Two stops.
- Q. Where were those?
- A. Weirgor and Stanbery.
- Q. For what purpose?
- A. At Weirgor for water and at Stanbery for coal and water.
- [fol. 519] Q. Did you stop to let another train pass you?
- A. I don't think we stopped.
- Q. Did you pass another train?
- A. We met a mixed passenger train No. 30 between Weirgor and Ladysmith. I don't remember the point we met them.
- Q. But you didn't have to stop for them?
- A. No, sir, as I remember, we didn't stop.
- Q. Where were they?
- A. They were on the siding.
- Q. Do you know something about the distance from Ladysmith to Gordon?
- A. From Ladysmith to Gordon it would be about 67 miles.
- Q. You recollect about this train breaking in two do you?
- A. Yes, sir.
- Q. Will you tell us where this was?
- A. On or around the St. Croix river bridge at Gordon.
- Q. Make any stop at Gordon?
- A. No, sir.
- Q. Where were you when the train parted?
- A. I was in the caboose.
- Q. About how far west of Gordon was the caboose when you stopped?
- A. Between a quarter and a half mile from the depot at Gordon.
- Q. Who was in the caboose?
- A. Myself and E. J. Goneau.
- Q. Where with reference to the bridges there did your caboose stop?
- [fol. 520] A. Our caboose was in the neighborhood of thirty car lengths from the St. Croix river bridge.
- Q. Was there another bridge towards Gordon from the St. Croix river bridge?
- A. Yes, there is the Eau Claire river bridge.
- Q. Where did the caboose stop with reference to the Eau Claire river bridge?
- A. I don't remember just where.
- Q. But did it stop on the bridge?
- A. I don't remember that.
- Q. What first called your attention to the break in two?
- A. The brakes applying on the train was what called my attention and the train stopping.
- Q. How did the train stop?
- A. It could be or would be called an emergency stop.

Q. Did it give you much of a jolt in the caboose?

A. No, it wasn't a bad jolt.

Q. Could you tell us the first thing you remember after the stop?

A. The rear brakeman, Goneau, went ahead to repair what was wrong, to find out what was wrong, anyway.

Q. Did he take anything with him, that you noticed?

A. It seems to me he took a large monkey wrench and an air hose.

Q. Did you tell him to do that?

A. I don't remember whether I told him or not.

Q. What did you think had happened?

[fol. 521] A. Owing to the fact it was not a bad stop I thought it was a broken air hose.

Q. If he had not gone ahead you would have gone ahead?

A. Yes, sir.

Q. Did you see him leave the caboose?

A. I remember of him leaving the caboose.

Q. Did you watch him after he left the caboose?

A. No, sir.

Q. What did you do?

A. I protected the rear of the train, figuring that we would be going at any time after Brakeman Goneau had arrived at the difficulty, whatever it was.

Q. How did you protect the rear of the train?

A. I took some fuses from the caboose and stood around behind the train with them.

Q. Did you use any of them?

A. I used one.

Q. What is a fuse?

A. A fuse is about as big around as a broom handle and contains something that burns and creates a red light. It is about from twelve to eighteen inches long. It is used for the protection of the train against another train or engine.

Q. What do you do with them?

A. They have a nail in the end. You stick them up in the track.

Q. That night did you stick one up in the track?

A. As I remember, I did.

Q. Between the rails on a tie?

A. I imagine.

[fol. 522] Q. How far back from the caboose?

A. That I don't know. It was not a great ways back. After a train passes the operator if he handled his block or order board properly he would drop it in a stop position and let it remain so for fifteen minutes. That would be so that another train could not follow your train for a period of fifteen minutes.

Q. And then after the fifteen minutes were up what would he do?

A. He would raise his block and the order board would be in a vertical condition, the light would show green.

Q. That would indicate what?

A. That would indicate proceed, that you had nothing to stop for as far as he was concerned.

Q. And when his block was down the light would indicate what?

A. The light would indicate red, stop.

Q. At any rate, you used this fuse?

A. Yes, sir.

Q. What is the next thing you remember about it?

A. After I lit the fuse I went towards the head-end of the train.

Q. How?

A. I walked.

Q. On the ground or on the cars?

A. I walked on the ground for a time and then I walked on top of the cars.

Q. Why did you go to the head end of the train?

A. To see what the trouble was.

[fol. 523] Q. Had anything called your attention to any trouble?

A. Yes, it had.

Q. What was it?

A. Well, the train coupling up as if the brakes had applied again and I knew instead of it being a broken air hose that we had broke in two or had been uncoupled for some reason.

Q. Was there a movement of the caboose while you were there?

A. While I was back behind the caboose there was a movement. You could see the lights on the caboose jar and the caboose moved and you could hear it move, in fact.

Q. How far did it move?

A. Not very far. I couldn't say. I wasn't right at the caboose.

Q. You could see whether the train moved, couldn't you, that is, the rear section?

A. The rear section, yes.

Q. About how much did it move, in your best judgment?

A. It jarred as though quite a hard coupling had been made.

Q. Then did it continue to move?

A. No, sir.

Q. After this jar as though a hard coupling had been made did it stop?

A. Yes, it was a jar as if a hard coupling had been made that your air had been coupled and parted again.

Q. What happened after that?

[fol. 524] A. If I remember right, that happened twice.

Q. Your caboose jarred twice?

A. Before I started ahead.

Q. The caboose jarred twice?

A. Yes, sir.

Q. Now, at the second jar did it move back?

A. I don't remember.

Q. Or do you recollect whether it went back any distance or not?

A. I imagine that it ended somewhat the same as the first jar, that it just merely jarred the caboose.

Mr. Anderson: I notice the witness says, "I imagine."

Q. What do you mean by saying, "I imagine," Mr. Bailey?

A. Well, I mean I wasn't close enough to the caboose to be able to tell how far it moved.

Q. What were you doing at the time of this second jar or movement?

A. I was back of the caboose to protect the train.

Q. How far back of the caboose were you?

A. Five to ten car lengths, I would say.

Q. The caboose came back towards you or do you know about that?

A. I know that it jarred back.

Q. And after this second jar back did you observe anything about the air?

A. No, sir.

Q. What did you do then after the second jar?

A. I lit a fuse and went forward towards the head end of the [fol. 525] train.

Q. And you say you went on the ground?

A. On the ground for a distance and then on top of the cars.

Q. Why did you go on top of the cars?

A. Well, many times it is easier to walk on top of the cars than on the ground.

Q. Why?

A. There is all sand at Gordon and if there is a wide shoulder on the right of way it would be easy to walk on the ground. But if there is not a wide shoulder, if it is narrow there, you could make lots better time on top of the cars, providing they were largely box cars that have running boards on top to walk on.

Q. And first where was it that you got up on top of the cars?

A. I don't know.

Q. Did you come to this St. Croix river bridge?

A. Yes, sir.

Q. Where were you when you came to that?

A. I was on top of the cars.

Q. Had your attention been called to anything up ahead at that time, Mr. Bailey, beyond this jarring of the caboose?

A. Only the head brakeman hollered back that Goneau fell off the bridge.

Q. How many times did he holler that?

A. A number of times.

Q. Where were you when he first began to holler?

A. I don't know how far toward him I was.

[fol. 526] Q. Could you see his light?

A. No, sir, I could see no lights.

Q. But you could hear him holler?

A. I heard him holler, yes, sir.

Q. Where did he seem to be?

A. When I got there I found him at the St. Croix river bridge. If I remember right, he was down below.

Q. But when he first began hollering you didn't know where he was?

A. I didn't know where he was at that time.

Q. When you came to the St. Croix river bridge, you say you were on top of the cars?

A. I was either on top or I got on top right before I got to the bridge.

Q. How far did you go on top of the cars?

A. The length of the bridge—from after I struck the bridge. It would be between five and seven car lengths, as I remember.

Q. Did you go clear to the west end of the bridge?

A. Yes, sir. I went off the bridge on top of the cars.

Q. Which part of the cars did you walk on?

A. On top of the cars, on the running board, in the middle.

Q. When you got over to the west side of the bridge, what did you do?

A. I got down immediately and went down to the bottom of the bridge.

Q. How did you go down?

A. Just walked down the bank.

[fol. 527] Q. Tell us who you found there?

A. I found Brakeman Goneau and I think Brakeman Rocheleau was down there.

Q. Where was Goneau?

A. Goneau was quite at the bottom of the embankment bank, going down.

Q. What was he doing?

A. He was sitting there in the sand. Not very far from the bottom of the bridge.

Q. Where was Rocheleau?

A. I couldn't say as to that only that I think he was down there.

Q. Did you have any talk after you got down there?

A. When I got down there, knowing that Goneau was injured, I tried to help him up the bank.

Q. How?

A. I took hold under his arms to help him up to get him on top of the bank. And I was not able to do that because he was injured and in such pain that he could not stand to be handled that way.

Q. Was that what he said?

A. Yes, sir, he didn't want me to help him to the top.

Q. Then what did you do?

A. Mr. Goneau wanted me to get a doctor, which I done.

Q. After you tried to help him up the bank then what was done next?

A. I told Rocheleau that we would take Goneau up with the engine and that we would back the train over the bridge and take [fol. 528] Goneau up on the engine and I would go down town and get a doctor.

Q. Then what was done?

A. I went down town to get a doctor, after looking at the bad order defective car on the bridge.

Q. How did you look at the bad order car?

A. Why, I went to the top of the bridge and hung on the side of the cars, as I remember, and looked at the defective carrier iron or coupler that happened to be there.

Q. How did you know that there was a bad order car on the bridge?

A. Mr. Goneau told me there was a bad order car on the bridge.

Q. When you got back upon the bank at the west end of the bridge you worked your way along until you came to this place?

A. Yes, sir.

Q. About how far out on the bridge was that?

A. I think it was three car lengths from the west end of the bridge.

Q. Tell us just what you found there?

A. I found the train coupled.

Q. The what?

A. The train coupled together.

Q. You did?

A. Yes, sir.

Q. Did you notice the joint?

A. Yes, sir.

Q. Was it made?

A. It was together, but I would not swear that it was made, to hold [fol. 529] together, or not. It was coupled, but whether it was coupled so that it would hold or not I don't know; that is, whether the knuckle pin was absolutely down or not, but it was in a coupled position.

Q. It was?

A. Yes, sir.

Q. And about the air hose, what shape were those in?

A. The air hose was coupled.

Q. Was the air cut in?

A. No, the air wasn't cut in.

Q. What was the situation there?

A. The angle cock on the head portion of the train was closed to hold the air in the head portion of the train.

Q. Did you do anything with reference to that?

A. Yes, sir.

Q. What did you do?

A. I cut the air in.

Q. That let it into the hind portion, too?

A. Yes, sir.

Q. What did you do that for?

A. I figured that we would back up, as I told Brakeman Rocheleau, and take the injured man up on the engine.

Q. Did you do anything more where this bad order car was?

A. I don't remember that I did, unless after coupling up the air I went to the top of the train.

Q. Did you couple up the air?

- A. Or after cutting in the air. I didn't couple up the air.  
[fol. 530] Q. That was already coupled?  
A. The air was already coupled.  
Q. After cutting in the air you went on top of the train?  
A. Yes, sir.  
Q. Then where did you go?  
A. I went back towards the rear end and, if I remember right, I told Rocheleau that we would back up.  
Q. Did they back up?  
A. Yes, sir.  
Q. Where were you when they backed up?  
A. I was on top of the train going toward the rear end.  
Q. Do you remember how near the rear end of the train you had got before the train backed up?  
A. I don't remember.  
Q. Who gave the signal to back up?  
A. I am quite sure I gave a signal to back up; naturally I would.  
Q. Where did you give that from?  
A. Top of the cars.  
Q. Do you know where Rocheleau was when you backed up?  
A. I do not. Whether he was down the hill with Goneau or whether he was up on the bank I don't know.  
Q. Have any trouble backing up, Mr. Bailey?  
A. The train backed up very hard.  
Q. How far did you back?  
A. We backed up from the defective car at the St. Croix river bridge until the engine was on or by the bridge, which would be forty [fol. 531] car lengths.  
Q. Was the engine clear off of the bridge?  
A. As I remember, it was.  
Q. Where were you, though, at that time?  
A. I was down town, or on my way down town. All I know about the engine is where it stood when I returned.  
Q. And did you get a doctor, did you?  
A. I had a doctor come over to the depot.  
Q. Did you have to go down town to get him?  
A. No, sir, I sent the operator or somebody that was at the depot after the doctor.  
Q. You stayed at the depot?  
A. Just long enough to notify the train dispatcher that one of my brakeman had been injured and that we had had an accident.  
Q. After you had sent that word, what did you do?  
A. Returned to the head end of the train, as I remember.  
Q. Did you go to the engine?  
A. Yes, sir.  
Q. Who did you find there?  
A. I found the engineer, George Barnaby.  
Q. Find the fireman?  
A. I don't think I did.  
Q. Was there anybody on the engine then except Barnaby?  
A. Not that I remember of.

Q. Did you go on this trip from the end of the train, this east end of the bridge, over to the west end when they went over with the [fol. 532] engine to try to get Goneau?

A. No, sir, I wasn't there at that time.

Q. That was while you were getting the doctor and sending the report in?

A. Yes, sir.

Q. So you found just Barnaby on the engine?

A. Or around the engine. I don't remember which.

Q. What did you do then?

A. I got up on the engine and Barnaby told me that the fireman had gone out to flag No. 18 and that they could not pick Goneau up to put him on the engine and they would have No. 18 pick him up on a stretcher.

Q. Then what did you do?

A. I got in the engineer's tool box or around the engine and searched around there for a bolt or nut to repair this bad order car with.

Q. Did you find them?

A. I didn't find either one.

Q. Where did you go then?

A. I got, as I remember, a small monkey wrench from the engine.

Q. Then where did you go?

A. Back to repair the defective car.

Q. Did anyone go with you?

A. Barnaby.

Q. Did he go clear to the bad order car?

A. No, he did not.

Q. Why not?

Mr. Anderson: Legs too short; couldn't keep up.

A. He wasn't making very good time and I sent him back to the [fol. 533] engine.

Q. He is built different from you?

A. Somewhat. He seemed to fall quite a ways back and I figured he would be needed on the engine when the passenger train arrived.

Q. Did you find this bad order car?

A. Yes, sir.

Q. Tell us what you did there?

A. I found the bad order car on the east end of the Eau Claire river bridge. I remember that quite distinctly because I had to crawl around on this bridge under the car in order to get a nut to repair the defective carrying iron; that is, to get a nut to place this carrying iron back where it was.

Q. Tell us just what you found the matter there?

A. Why, the nut on the carrying iron had come off. The bolt was very crooked and uneven; whether it had unscrewed or whether it had just stripped or not and come off, I don't know. I don't remember.

Q. That was on which side?

A. I don't remember that at all distinctly, about which side it was off on.

Q. You know it was off on one side?

A. I know it was off on one side.

Q. How was the other side, Mr. Bailey?

A. I don't remember the other side.

Q. Was there any trouble on the opposite side from where this nut was off?

A. I don't remember.

Q. Well, which side did you fix?

A. As I remember it, I fixed the carrying iron on the left hand [fol. 534] side.

Q. The opposite side, whichever it was, did you have any trouble with that?

A. Not that I remember of.

Q. You say you found a nut under the car?

A. I found the nut on the car.

Q. Underneath?

A. Underneath.

Q. Was the bolt of the carrying iron there in its place?

A. It was.

Q. Tell us just how you fixed it after you found this nut?

A. I got a nut off a bolt under the car and maybe more than one. I don't know. But there was two men and also the operator was there or come before we got through repairing this defect.

Q. Just how did you repair it?

A. They held up the draw bar and I think I handled the carrying iron, that is, likely held it up with my hip so I would have the use of both hands and somebody held the wrench on top of the bolt.

Q. Yes?

A. Because the nut was quite hard to put on on this bolt.

Q. Yes?

A. And as I remember, I put it on and battered the bottom of the bolt so that it wasn't going to come off again.

Q. What did you batter it with?

A. With the large monkey wrench.

[fol. 535] Q. Did you have more than one monkey wrench there?

A. Yes, sir. I got one off the engine and Goneau brought the other one up.

Q. You don't mean Goneau?

Mr. Anderson: He means he took it with him when he went out to fix the train.

A. Why there was two wrenches there.

Q. Where did you find the big one?

A. I don't remember. I know one time they were on top of the car. But whether it was there at that time or not, I don't know.

Q. Was it the one Goneau took with him that you used to fix the bolt?

A. Well, there were three wrenches there. There was the wrench

I got off the engine, a large monkey wrench and an S-wrench. But it is not clear to me where the S-wrench and the large monkey wrench come from. But it is quite likely that Goneau might have taken the S-wrench up to fix the air hose the first time as an S-wrench is a very good wrench to use to fix an air hose.

Q. At any rate, you had two wrenches, you know that?

A. Had two wrenches to repair this defective car with. A large monkey wrench and a small one.

Q. Did you have any difficulty in putting the nut on?

A. Yes, I did. It went on very hard.

Q. After you got it on did it stay?

A. Yes, sir. I battered the bolt so that it would stay.

[fol. 536] Q. Do you know whether you put on one or more?

A. I think I put on more than one that were larger than the bolt that acted as washers.

Q. Oh, slip-nuts?

A. Slip-nuts, as they might call them.

Q. How many of those do you think you put on?

A. I don't know how many I used.

Q. Where did you get those?

A. It seems that I had a big nut or found one around there some place and it is very possible I took another one off of the bottom of the car that was too big before I got the kind of a nut I wanted. I would not swear to that.

Q. This carrying iron when you found it there was it down?

A. It was, as I remember, from three to five inches down.

Q. On this one side?

A. Yes, sir.

Q. Did that let the draw bar drop down?

A. The weight of the draw bar was on it.

Q. And do you remember anything about the position it was in?

A. The carrying iron was shoved forward.

Q. Not back under the car?

A. No, sir.

Q. That is, this end that you fixed this loose nut on was shoved forward.

Mr. Anderson: Does he mean now it was under the big end of the [fol. 537] draw bar or back under the shank?

A. No, it was not under the big end of the draw bar.

Mr. Anderson: I think when you say forward you mean towards the engine, don't you?

A. No, sir.

Mr. Anderson: All right. I just want to be sure.

A. I mean towards the rear of the train, figuring, that is, the east end as the head end of the car.

Q. All right. It was east, then, towards you as you stood back of the car?

A. Yes, it was.

Q. After you got this defect repaired, what did you do, Mr. Bailey?

A. After I got the defect repaired, I coupled the train up and backed up so that No. 18 could come on the siding.

Q. Yes.

A. They also unloaded the injured man at the depot.

Q. You stayed on the main line with your train?

A. My train stayed on the main line and No. 18 took the siding.

Q. And what did you do then?

A. After letting No. 18 on the passing track it would be necessary to pull forward towards Superior so that they could head out the other end and leave town.

Q. That is what you call sawing by, is it?

A. Yes, sir.

[fol. 538] Q. After eighteen had sawed by, what did you do?

A. We set out fifty cars, cut the crossing in there and set the necessary brakes on them so that they could not start for any reason, and coupled up, went to the depot, put Mr. Goneau, the injured brakeman, in the caboose and started towards Superior.

Q. You went with your train, I suppose?

A. Yes, sir.

Q. Did you take this crippled car to Superior?

A. We did not.

Q. Left it there on the siding?

A. That stayed there.

Q. Did you afterwards get it?

A. No, sir. It was brought in the next day by another crew.

Q. When you got up on the cars, as you say, and walked the entire length of that St. Croix River bridge over to the west end, did you come to any break in the train?

A. I did not.

Q. You did not?

A. No, sir.

Q. Did you have any difficulty in walking clear over?

A. None whatever.

Q. None whatever. That is, on top of the cars, I mean?

A. No, sir.

Q. You did walk on the top of the cars all the way?

[fol. 539] A. I walked on the top of the cars.

Q. This defective car, do you know the number of it?

A. Yes, sir.

Q. What was it?

A. L. V. 82182.

Q. What does "L. V." mean?

A. Lehigh Valley Railroad.

Q. That is some eastern road, isn't it?

A. Yes, sir.

Q. In your train book did you make a record of the number of that car, Mr. Bailey?

A. Naturally, when I have an accident I put a mark at the car, a cross or something of that kind.

Q. Did you do that in this case? Take your train book and see?

A. I saw it. I looked a moment ago. Yes, sir.

Q. You did and what kind of a mark is that?

A. It is what I always use in a case of that kind. It is not a ditto mark.

Q. Two marks vertically and two horizontal ones?

A. Yes, sir.

Q. Something like the ones we used to put down when we played tit-tat-to, is that it?

A. Something like that.

Q. Let me see that. Will you show us the mark that you made there?

(Witness does so.)

Q. Now, that is after the initials L. V. and the number 82182? [fol. 540] A. Yes, sir.

Q. And that means what?

A. That means that that car I wanted to remember to make a report or long afterwards.

Q. And where did you put that down, that mark?

A. I would naturally put that down right at the accident.

Q. Did you?

A. Yes, sir, I did. I always do that; figure on doing so.

Q. Where did you get the number from?

A. Off from the car.

Q. Is each car plainly numbered on the side?

A. Well, not always awfully plainly numbered that is, the paint lots of times wears out, but as a rule you can tell what they are. I have had to jump from one side of the train to another to tell a number.

Q. Well, the number is on the side; is it anywhere else?

A. On both sides and both ends of the car and sometimes, quite often, on both doors.

Q. And that is the way you know a car, designate a fixed car, is by its number?

A. By its number and initial.

Q. The entry that is made right after this mark, I notice you have made that mark again right over opposite the line on which you have this car?

A. Well, that is to tell about the defect. "B. O. carrying iron bolt allowed draw bar to drop at Gordon."

[fol. 541] Q. When did you make that entry?

A. Why, it is quite possible I made it down at the depot or in the caboose.

Q. How soon after the accident?

A. Whenever I got time after I got the train set out. Either in the depot or at the caboose.

Q. That is the record that you made of the accident to form the basis of what?

A. To form the basis of having some knowledge of what to turn into the chief train dispatcher or the superintendent.

Mr. Anderson: I suggest, Mr. Palmer, we will save time if you will let me know what you are after. I am a great fellow to concede things.

Mr. Palmer: We will offer in evidence this train book, Exhibit 8, and I will say particularly, if your Honor please, so we won't get confused, the pages which I will designate by a red X mark.

Mr. Anderson: Why, if the purpose is to offer this to identify the car, I have no doubt but that it was Lehigh Valley car of the number the witness stated and so concede.

The Court: Is that the only object of it?

Mr. Palmer: Well, and the entries that the witness made at the time.

The Court: He has testified to them all. They are all in the record.

Mr. Palmer: Well, he hasn't got it all down; that is, he hasn't mentioned it all.

The Court: Is there any portion to which you specifically object?

Mr. Anderson: No, as far as the entries there, car numbers, car [fol. 542] initials, where taken, where going, there is no use going into that; all conceded. Put anything you want in. I don't care.

Mr. Palmer: Very well. It is received?

The Court: Received.

Q. Will you just read that entry that you made with reference to this car and to the accident?

A. I didn't put down a great deal. Just "B. O. carrying iron bolt, allowed draw bar to drop at Gordon," and this X so that I would understand or anybody else that it is the same car.

Q. That you marked over on the opposite page?

A. Yes, sir.

Q. What does "B. O." mean?

A. Bad order.

Q. Then you have another entry there below, what is that?

A. "Left Gordon at 8:45." That is just to remember that and "No. 18 delay 45 minutes." Quite often you have to send a message. In fact, lots of time you send them without being asked for them. When you delay a first class limited train like that, you send a message. In that case, I don't think I did. But many times you do and naturally you keep a record of that. Of course when you go along on a successful trip and nothing happens, why, you don't put anything down on these remarks at all and many times when something does happen you don't put down enough.

Q. So you tried in this case to put down enough?

Mr. Anderson: No, he doesn't say that.

A. I would not say that I did. There isn't as much down here as [fol. 543] might be.

Q. What are those names you have above there?

A. That is the doctor at Gordon.

Q. What was his name?

A. Yes, sir, Dr. J. W. Blythen.

Q. He is the company surgeon at Gordon?

A. No, sir, he is not a company surgeon.

Q. You have another name there?

A. G. Tothess.

Q. What does that mean?

A. Why, he is a fellow that was around there and volunteered that if he could be of any help that he would go to Superior to help us.

Q. Did he go to Superior?

A. He did.

Q. Can you tell by this train book which car that was, how far it was from the engine and how far from the caboose?

A. 31st car from the caboose, fortieth car from the engine.

Cross-examination.

By Mr. Anderson:

Q. Just a little more information about conditions down there when you were taking these nuts off that inadvertently has not been called for; your train was parted?

A. Yes, sir.

Q. How far?

A. I don't remember that.

Q. I mean because some air hose disconnected?

A. Yes, the air hose were disconnected. A train moving the way [fol. 544] that train was likely backing up would not part very far.

Mr. Palmer: This was when?

Mr. Anderson: After he had backed off the bridge.

Mr. Palmer:

Q. Oh, after the accident?

A. That was when I was repairing the car?

Q. Yes, I say you backed down off the bridge and stopped?

A. Yes, sir. The train just stopped itself. I wasn't there.

Q. I know it. Later on when you got around to it, after your train had stopped, you went down there and you found this car coupler separated?

A. Yes, sir.

Q. Because the draw bar was so low down it would not hold to the other one?

A. That is the reason.

Q. And the carrier iron was broken loose at one end because a nut was gone, that is right, isn't it?

A. Yes, sir.

Q. And the air hose was then disconnected?

A. Yes, sir, the air hose would be pulled apart.

Q. Yes. Not broken?

A. No.

Q. Then you fixed her up?

A. Yes, sir.

Q. This time you had a chance and help and got nuts and screwed them on and got the carrier irons up so that it would hold the draw bar and you could handle it both in the forward motion and the [fol. 545] backward motion, I mean the train?

A. Then, certainly.

Q. This coupler held then back and forth?

A. Yes, sir.

Q. And when you went up to the scene of the accident on top of the train, when you got there the sections of the train where they had broken apart up on the St. Cloix bridge were together when you got up there?

A. They were together, yes, sir.

Q. Whether the couplers were coupled so as to be coupled you do not know?

A. I do not know.

Q. But the knuckles were there?

A. Yes, sir.

Q. And they were together?

A. Yes, sir.

Q. And when you got up there you found the air hose coupled?

A. Yes, sir. I remember the air hose was coupled.

Q. Pretty sure of that, aren't you?

A. I know that.

Q. And the angle cock on the car which would be the 40th car, the defective car was closed when you got up there?

A. It was closed.

Q. And the closing of that angle cock is a mere flip?

A. That is all.

Q. And the coupling of the air hose is a mere motion of the hand and it is done?

A. It is.

[fol. 546] Q. And that portion of your train from the St. Croix river up to the Omaha bridge was on a down grade to the east somewhat, wasn't it?

A. Somewhat down grade.

Q. And when the angle cock is closed on that car and the air pumped in, the brakes release, don't they?

A. Yes, sir.

Q. And when the brake is released, the tendency of cars is to drift down hill, I take it?

A. Well—

Q. Tendency, notice I said?

A. Yes, the tendency would make them drift down hill. Still, I don't think the grade is bad enough up there so if you had a car stop without an engine on it it would run away from you.

Q. Oh, no, I didn't talk anything about running away. You have had lots of experience in railroad work where you have had dealings with cars, haven't you?

A. Yes, sir.

Q. You have had the experience lots of times where cars will

stand upon a certain grade many times and you put other cars under like circumstances and they will move?

A. Yes, many times.

Q. Lots of cars move with a great deal more ease than others?

A. Yes, sir.

Q. And cars will drift down a very slight grade sometimes and other times they will stick and won't drift, isn't that right?

[fol. 547] A. That is right.

Re-direct examination.

By Mr. Palmer:

Q. Mr. Bailey, when you went to this bad order car on the bridge there did you touch the coupling at all?

A. The first time?

Q. Yes.

A. I didn't do anything to the coupling, as I remember it.

Q. You did not?

A. No, I just wanted the train so that we could back up and get this man picked up and get a doctor to help him and then when I had help or got help to repair the defective car.

Q. Did you touch the coupling or have any movement of the train whatever there till you got back toward the hind end and they started to back off the bridge?

A. All I done was to cut in the air and back up the train at some point, as I remember it.

Q. When you backed up the train were you on the ground or on the car?

A. On top of the car.

Recross-examination.

By Mr. Anderson:

Q. You made a conductor's report here of this accident?

A. I did.

Q. To this claim agent?

A. To Mr. Bratager.

Q. Turned it in?

[fol. 548] A. Yes, sir.

Q. As conductor, you are required to go into details quite fully?

A. I don't remember what I put on the report. I know I gave Bratager a report.

Mr. Anderson: All right, that is all.

Mr. Palmer: You made a report to the superintendent, didn't you, using this stuff in your book as a basis of it?

A. Yes, did.

Mr. Palmer: That is all.

Mr. Anderson:

Q. But this other report you made to the claim agent isn't the superintendent's report?

A. No, it is not.

Q. The claim agent's report is so as to advise the claim department as to the details of an accident?

A. It is.

Redirect examination.

By Mr. Palmer:

Q. When you repaired this Lehigh Valley car 82182 on the night in question, did you observe anything else broken or out of order, other than this carrier iron being down on the one side, the nut off the bolt?

A. No, sir.

Q. You did not?

A. I did not.

Recross-examination.

By Mr. Anderson:

[fol. 549] Q. Counsel used the words "out of order," the coupler was out of order as an automatic coupler, wasn't it?

A. You could not couple owing to the fact that the carrier iron would not hold it up.

Q. And owing to the fact that the draw bar was down and twisted?

A. Caused from the carrying iron.

Mr. Anderson: Yes, certainly. That is all.

Mr. Palmer: Was the draw bar twisted?

A. The draw bar was not bad order.

Mr. Palmer: No, that is all.

Mr. Anderson: All you mean by that is that the draw bar as a piece of iron was not broken?

A. No, sir.

Mr. Anderson: That is all.

Mr. Palmer:

Q. Nor the coupler?

A. Nor the coupler.

ERNEST J. GONEAU, plaintiff, re-called by defendant for further cross-examination, testified as follows:

Cross-examination.

By Mr. Palmer:

Q. I understand you to say that the carrier iron on this defective car on the night in question was a flat strip of iron?

A. I believe it was, yes, sir.

Q. About two feet long?

A. Something like that.

Q. Four inches wide.

[fol. 550] A. Yes, sir.

Q. Seven-eighths of an inch thick?

A. Yes, sir.

Q. And your best recollection is one hole in each end?

A. Yes, sir.

Q. I show you this Defendant's Exhibit 9, which is a flat piece of iron seven-eighths of an inch thick, twenty-four inches long and four inches wide; I will ask you if that is substantially like the carrying iron on the car in question that you have testified to?

A. Yes, it is about like it.

Mr. Palmer: We will just offer this Exhibit 9 for the purpose of illustration.

Mr. Anderson: No objection.

(Exhibit 9 received.)

A. D. ROTH, on behalf of defendant, duly sworn, testified as follows:

Direct examination.

By Mr. Palmer:

Q. What is your full name?

A. A. D. Roth.

Q. Where do you live?

A. Minneapolis.

Q. How long have you lived there?

A. About thirty years.

Q. What is your business?

A. Commercial photographer.

Q. How long have you been in that business?

[fol. 551] A. I have been in business for myself about twenty-two years.

Q. Do the work yourself?

A. Yes, sir.

Q. You do some work for the Soo Line?

A. I do.

Q. Did you have occasion to take a photograph of a freight box car here some days ago?

A. Yes, sir.

Q. Where did you take that picture?

A. At the Shoreham yards in Minneapolis.

Q. At whose request did you take these photographs?

A. Legal department, of the Soo Line.

Q. I call your attention to this Defendant's Exhibit 10 and will ask you if that is a photograph taken by you?

A. Yes, sir.

Q. Will you give the date of taking it?

A. February 19th, 1923.

Q. And that is the one that you took at the Shoreham yards in Minneapolis?

A. Yes, sir.

Q. Does the number of that box car show on your photograph?

A. Yes, sir.

Q. And the make of the car?

A. Well, it has Lehigh Valley on.

Q. What number is shown on there?

A. 82182.

Q. Is that a correct photograph of that car at that time?  
[fol. 552] A. Yes, sir.

Mr. Anderson: Is that the number the conductor gave?

Mr. Palmer: Yes.

Mr. Anderson: This is the car, is it?

Mr. Palmer: Yes, Lehigh Valley 82182.

Q. Showing you Defendant's Exhibit 11, I will ask you if that is a photograph taken by you?

A. Yes, sir.

Q. At the same time and place?

A. Made two or three days later. It is a portion of the same car.

Q. What portion?

A. It is one side of the coupling end.

Q. Which end of the car as it is usually designated?

A. This is what I was told, it was the A end. The brake was on the other end.

Q. Which side as you stand facing that end of the car?

A. It was on my right.

Q. What is Exhibit 13?

A. This is a portion of the same car from the same end, but the other side.

Q. Which side as you stand facing the car?

A. On my left.

Q. Showing the coupling apparatus?

A. Yes, sir.

Q. What is No. 14?

A. It is a photograph of the right hand side of the other end of the car, the B end.

Q. State whether or not that is the end with the brake beam on it?  
[fol. 553] A. That is that end.

Q. What is Exhibit No. 15?

A. That is the B end, left hand side of the same car.

Q. As you stood facing the car?

A. Yes, sir.

Q. Is that a correct photograph of that end of the car showing the coupling apparatus?

A. Yes, sir.

(No cross examination.)

HENRY GREENSETH, on behalf of defendant, duly sworn, testified as follows:

Redirect examination.

By Mr. Palmer:

Q. Your full name, please?

A. Henry Greenseth.

Q. Where do you live?

A. Superior, Wisconsin.

Q. How long have you lived at Superior, Wisconsin?

A. Twenty-two years.

Q. How old are you, Mr. Greenseth?

A. Sixty-seven.

Q. Where did you live before you lived at Superior?

A. Duluth.

Q. Are you a man of family?

A. Yes, sir.

Q. What is your business?

[fol. 554] A. Car foreman for the Soo Line.

Q. Whereabouts?

A. In Superior.

Q. Does the Soo Line have yards at Superior?

A. Yes, sir.

Q. What do they do there?

A. Inspecting and repairing cars.

Q. How long have you been the car foreman at Superior for the Soo Line?

A. A little better than fourteen years.

Q. And prior to that what was your work?

A. Inspecting for the N. P.

Q. How long did you inspect for them?

A. Nine years.

Q. Before that what was your business?

A. For the Great Northern at Duluth.

Q. How long were you with the Great Northern?

A. Six years.

- Q. Before that?  
A. St. Paul and Duluth.  
Q. How long?  
A. Four years.  
Q. And before that?  
A. Northwestern.  
Q. How long have you been handling cars?  
A. About thirty-six years; been railroading about forty years.  
Q. Have you been a car repairer and car carpenter?  
A. Yes, sir.  
[fol. 555] Q. You know something about cars, then, I take it?  
A. Yes, I know something.  
Q. What are your duties as car foreman at Superior?  
A. Supervising the work of the men that is under me.  
Q. Do you employ many men up there?  
A. Yes, sir, about from a hundred to two hundred men.  
Q. And you supervise that work?  
A. Yes, sir.  
Q. Do you have some duties with reference to inspecting cars?  
A. I have occasionally, like this here, anybody hurt or anything they generally call on the car foreman to inspect it himself.  
Q. With reference to this accident October 27th, 1920, were you called on to inspect a car?  
A. Yes, sir.  
Q. And what car was it?  
A. L. V. 82182.  
Q. What do you mean by L. V.?  
A. I understand that to be Lehigh Valley.  
Q. How did you come to make an inspection of that, Mr. Green-  
seth?  
A. I was requested to do so by the superintendent's office.  
Q. And for what purpose did you make the inspection?  
A. They claimed that somebody claimed an accident in connection with the car.  
[fol. 556] Q. And what date did you make the inspection?  
A. On the 29th of October, 1920.  
Q. Where did you make the inspection?  
A. In the Superior yards.  
Q. And when you make an inspection of this character do you keep a record of it?  
A. Yes, sir.  
Q. What do you keep it in?  
A. Keep it in a book.  
Q. Is it a book kept for that purpose?  
A. Yes, for that purpose.  
Q. When you make an inspection what do you do with reference to this book?  
A. Write it down.  
Q. I show you this book which I will call Defendant's Exhibit 16, whose book is that?  
A. It belongs to the Soo Line, kept by me.

Q. The entries are made by who?

A. Some of it by the assistant foreman and some by me.

Mr. Anderson: I don't question his books.

Q. Will you turn to the record that you have of this inspection at that time?

A. Yes, sir.

Q. Have you found that entry?

A. Yes, sir.

Q. What page of that book is it on?

A. Page 90.

Q. Does it give the number of this car?

A. Yes, sir, 82182, L. V.

Q. Did you put this down at the time you made the inspection?  
[fol. 557] A. Yes, sir.

Q. In your own handwriting?

A. Own handwriting.

Q. Does it give the results of your inspection?

A. Yes, sir.

Q. Will you kindly read it?

A. "One buffer block broken, one end sill, two center sills bent, four horizontal carrier bolts missing, two vertical bolts missing, two vertical carrier bolts too long, one on the west side, south end, seven inches, badly bent, and the other side three-quarters by four and a half."

Q. On the other side what?

A. Bolt on the other side.

Mr. Palmer:

Q. Three-quarters by four and a half?

A. Right bolt should have been three-quarters by four. That is the standard to the car. It showed that new nuts had been put on very lately.

Mr. Palmer:

Q. Been put on these bolts?

Mr. Anderson: He said lately. Does it read "lately" there? Read it just exactly as it is.

A. Yes.

Mr. Palmer:

Q. You spell it out, give it to us?

A. No, it only says, "put on the bolts." That is it.

Q. New nuts had been put on these bolts?

A. Yes, "and the two bolts mentioned was the only ones holding up coupler end."

[fol. 558] Mr. Anderson: "On the other." I just do that to help.  
Mr. Palmer: Yes, that is all right.

A. "On the outer end," that means the front. "Found lower coupler pocket bent downward, showing car had been run with coupler hanging down and had struck the next car, one middle strap bolt missing, one draw spring broken, 80,000 capacity steel under frame car 31 $\frac{3}{8}$  inch high." That means the coupler from the rail. That is all I got on it.

Q. The expression you used here "on B end," what do you mean by that?

A. That means on the brake staff end, facing the end right and left.

Q. And "buffer block," what is the buffer block?

A. It is what we used to call the deadhead in old time days, what the coupler strikes against, head block some call it.

Q. This buffer block was made of what?

A. Steel casting, I think.

Q. What is the end sill?

A. The sill on the end of the cars that binds the two side sills and connects with the center sill.

Q. Runs across the car, does it?

A. Runs across the car.

Q. The two center sills, where are those?

A. They are the ones that the coupler is attached to, part of the car on both sides of the center of the car the full length.

Q. What are those made of?

A. Steel.

Q. What is this end sill made of?

A. Steel.

[fol. 559] Q. What kind of a carrier iron did this car have on it?

A. Had an angle carrier.

Q. What do you mean by angle carrier?

A. Carrier that is formed at an angle.

Q. Is that all one piece?

A. All one piece.

Q. What is the top part fastened to?

A. To the buffer.

Q. When you speak of verticle carrier bolts you mean what?

A. Well, up and down bolts.

Q. That go through the top part and the buffer?

A. Yes, sir.

Q. You say two of those were gone?

A. Two of them was gone, the inner side ones. There is two on each side, but the inside ones was missing and the outside ones was there.

Q. The inside bolts were gone and the two outside bolts were there?

A. Yes, sir.

Q. You say four horizontal carrier bolts missing?

A. Yes, sir.

Q. What do you mean by that?

A. Bolts that goes lengthways with the car.

Q. There was room for how many bolts?

A. Four.

Q. How many on each end?

A. Two on each end.

Q. To what are those bolted or fastened?

[fol. 560] A. They are fastened to a strap that runs under the ends.

Q. What is that support made of?

A. Made out of steel.

Q. How big is it?

A. It is about  $\frac{3}{8}$  thick, five inches wide and drops down about five inches below the end sill.

Q. Which part of the carrier iron is fastened to that?

A. The horizontal bolts goes through that.

Q. That will be the part of the carrier iron that is up and down?

A. Yes, sir.

Q. And those were all four gone?

A. All four, yes.

Q. The two vertical carrier bolts too long, you say?

A. Yes, sir.

Q. One on the west side, south end?

A. Yes, sir.

Q. Which way was the car headed?

A. The car was headed north in the yard and this was on the south end and the west side the long bolt was on.

Q. As it headed north it would be which side as you stood facing it?

A. Well, facing the B end or the south end, why, of course, the left side would be the west and the right side would be east.

Q. On the left side as you stood facing it you say it was seven inches long?

A. Seven inches long.

Q. Have you some recollection about that bolt as to how it was [fol. 561] fixed up?

A. I know it was bent, badly bent. And I know there was at least two slip nuts on it, big nuts shoved ahead of the regular nut, but I would not say if there was two or three, but I think there was two. I think it was inch nuts on the three-quarter bolt and then underneath of that there was a three-quarter nut to hold the whole thing. Same thing on the other side.

Q. These slip nuts, about how wide are those?

A. Well, if they was inch and I think they was, they would be an inch thick.

Q. If they were an inch hole, you mean?

A. Yes.

Q. You think there were two of those, at least?

A. Yes, sir.

Q. Then there was the regular nut?

A. Then there was the regular nut.

Q. What size nut was that?

A. Three-quarters.

Q. About how thick was that?

A. About three quarters.

Q. Was that nut screwed on the bottom end?

A. It was up flush with the bolt, I think.

Q. Would that allow some play, looseness between the top part of the carrier iron and the buffer block above?

A. Yes, it would, at least two inches and more, probably two and a half. I wouldn't say. Something like that.

Q. And there was only this one bolt in that left hand side?

[fol. 562] A. Yes.

Q. On the right hand side?

A. There was only one bolt there.

Q. How long was that?

A. That was four and a half.

Q. It was what size bolt?

A. Three-quarters.

Q. Do you remember about the nuts on that?

A. Will be just about the same thing.

Q. Did it have any slip nuts on it?

A. No, sir.

Q. Was the nut on?

A. Yes, it was just flush with the bolt.

Q. You say it showed new nuts had been put on these bolts?

A. Yes, sir.

Q. The two bolts mentioned were the only ones holding up the coupler, this typewritten sheet says on the other side; what does your book say?

A. "On the outer side" The outer side of the carrier, the outer end.

Q. You mean it was the two inside bolts that were gone and the two outside ones that were there?

A. Yes, sir.

Q. The coupler pocket bent downward, showing car had been run with coupler hanging down and struck against the next car?

A. The car had struck another one, the coupler going down against another coupler, I presume.

Q. What is the coupler pocket?

A. That is a pocket that is connected to the coupler with two big rivets and that the spring followers and spring rigging is located in. [fol. 563] That is back under the car.

Q. How badly was this coupler pocket bent?

A. Not much. We didn't have to renew it.

Q. What do you mean by strap bolts?

A. Two straps that run lengthways to hold up the inner part of the coupler and they are secured by three bolts on each side and the middle bolt of them was missing but the other two bolts held it up.

Q. Which way are these straps run?

A. Lengthways with the car.

Q. These other cross pieces there fastened to those?

A. They hold up with the bolts, hook into the castings in the sills. The castings is riveted to the sill and some slots in the castings where you put the bolt in and they hang down and then you put your strap down and put on the nuts and there you are.

Q. How many of those strap bolts are there?

A. There are six, three on each side.

Q. And you say one was gone?

A. The middle one on one side.

Q. Did that let this strap fall down or anything?

A. No. No, sir.

Q. The other two held?

A. Yes, sir.

Q. What do you mean by draw spring?

A. Draw spring or coupler spring mean the same thing. Just to take up the shock of the movement of the cars or the pull on the [fol. 564] car.

Q. How many are there?

A. Two springs in this car.

Q. One being broken, what effect did that have?

A. Make a little more slack in there.

Q. It would strike a little harder?

A. Yes, sir.

Q. Height 31 and  $\frac{3}{4}$  inches, what do you mean by that?

A. That is measured from the top of the rail to the center line of the coupler head.

Q. What is the required height?

A. Thirty-one and a half is the least that should be, and running from that to 34 and a half. That is the rule.

Q. This was an eighth of an inch below the minimum?

A. Yes.

Q. This is Defendant's Exhibit No. 10, I will ask you if that shows this Lehigh Valley car 82182 as you saw it there in the yard?

A. Yes, sir, looks like it.

Q. I will give you No. 14 next, does that show the carrying iron?

A. This shows the carrying iron on the right side.

Q. As you stand facing the car?

A. Facing the car.

Q. And that shows the air hose on it, does it?

A. Yes, sir.

Q. Does that photograph show the same carrier iron as you found on there at the time?

[fol. 565] A. I would not say that. It shows a similar one.

Q. I mean the same character of carrier iron?

A. Yes, same kind.

Q. That shows an angle iron carrier, doesn't it?

A. Yes, sir.

Q. Does it show the same kind of a one as you saw there? Same construction, I mean?

A. Yes, sir.

Q. Exhibit 15, what does that show?

A. That shows the same end on the left side.

Q. Does it show the same construction with reference to the shape of the carrier iron and its supports?

A. Yes, sir.

Mr. Palmer: At this time we will offer in evidence if your Honor please, Exhibits 10, 11, 13, 14 and 15.

Mr. Anderson: I understand he says his recollection is that the carrier iron is of the same type?

Mr. Palmer: Yes.

Mr. Anderson: Same shape?

A. Same shape, yes.

Mr. Palmer:

Q. Fastened in the same manner?

A. Yes, sir.

Mr. Palmer: May I interrupt at this moment just to ask Mr. Roth a question?

The Court: Yes.

(Witness temporarily withdrawn.)

[fol. 566] A. D. ROTH, re-called on behalf of defendant.

Direct examination.

By Mr. Palmer:

Q. Mr. Roth, what are these chalk marks that we see on these photographs?

A. Those are marks that I put on. The iron, being dark, it was difficult to show in the photograph the outline without running into the other features and I put those on myself just before I photographed them so as to give a clearer outline.

Q. So as to give a clearer outline of the carrier iron?

A. Yes.

Mr. Palmer: Any objection to the photographs?

Mr. Anderson: No.

The Court: Received.

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HENRY GREENSETH, re-called on behalf of defendant.

Direct examination.

By Mr. Palmer:

Q. What do you mean by the B end of a car?

A. The B end of the car is either where the brake staff is located or else you can make it out from the way the piston travels, whichever end that travels towards is the B end.

Q. The trouble with this car was on which end?

A. The B end.

Q. Are the ends marked at all on the ends themselves?

A. No, sir.

[fol. 567] Q. I call your attention to this photograph defendant's Exhibit 15; will you point to the angle iron carrying iron?

A. Here it is right here so far as you can see it.

Q. Outlined in chalk?

A. Outlined in chalk.

Q. The top part of it here comes under what?

A. That comes under the coupler located over here.

Q. By the coupler you refer to what, the draw bar?

A. Yes, that is the same thing. Couplers is the proper name.

Q. The whole business you call the coupler?

A. No, just the front part of it is the coupler.

Q. This top part of it, then, comes flat under there?

A. Yes, sir.

Q. What is the dimension of this angle iron carrying iron, that is, this top part of it, front to back?

A. Four inches.

Q. And what is the dimensions the other way, going down vertically?

A. Four inches.

Q. So it is four by four?

A. Yes, sir.

Q. Do you know anything about the length of it?

A. I think it is something like nineteen inches.

Q. On this Exhibit No. 15, we can see the left hand end, as I understand it?

[fol. 568] A. This is the B end; this is the left hand side, yes.

Q. Will you show me this mental buffer block that you have talked about?

A. You can see part of it here. Then three rivets comes through it, raised over and comes over (indicating).

Q. Does that seem to have this hole in it into which the coupling apparatus sticks?

A. Yes, the slot is right here.

Q. But did that one commencing outside go onto the right hand side there?

A. Yes, sir.

Q. It is all one casting?

A. Yes, sir.

Q. You call that a buffer block, do you?

A. Yes, sir.

Q. What is this one made of?

A. I think it was made of cast steel.

Q. Will you show us the vertical carrier iron bolts?

A. Those two here that go up and down.

Q. With the nuts on?

A. Yes, sir.

Q. Those are what size, you say?

A. Three-quarter size and four inches long. You can see them right underneath there.

Q. Where you can see the supports sticking out?

A. No, you can see the nuts sticking out.

Q. No, those appear to be the nuts here (indicating).

A. Well, it is too, but they could be turned either way.

[fol. 569] Q. What is this that I see sticking down below this vertical portion of this carrier iron?

A. It is the support of the carrier iron, where the horizontal bolts is fastened to and that runs clean up under the end sill. You can't see it from the outside. It runs underneath and then fastened on them three rivets in this buffer block.

Q. These three rivets I see in that buffer block go through that support, is that what you mean?

A. Yes, sir.

Q. And that support is made of what?

A. Made of steel.

Q. How thick is it?

A. Three-eighths, I think.

Q. How wide is it?

A. Five inches.

Q. Runs clear back of the end sill?

A. Back of the end sill.

Q. The end sill is this long part that you see across there, is it?

A. That is the end sill.

Q. That carrier iron support plate here runs clear back of the end sill does it??

A. Yes, sir.

Q. Do you know how long it is up and down here?

A. About fourteen all together, I should judge, because the end sill is about nine inches. And it runs clean up to the decking here.

Q. How far does it stick down below this vertical part of this angle iron carrying iron?

[fol. 570] A. A little better than half an inch.

Q. On each side?

A. Yes, sir.

Q. We will say there is one bolt holding over on the left hand side, and there is one bolt only as you found it on the right hand side?

A. Yes, sir.

Q. But the burr is gone off of that bolt, and the carrying iron has consequently dropped down?

A. Yes, sir.

Q. We will say three or five inches?

A. Yes, sir.

Q. Sagging down the draw bar, I will ask you if it is possible for that carrier iron to swing around under the draw bar?

A. I don't think so.

Q. Why?

A. Because the lug on the other side will hold it from doing that, will prevent it from swinging under the coupler.

Q. As to this carrier iron support here, if it dropped down, we will say, five inches down here (indicating), would it be possible for it to swing around under the draw bar?

A. I don't think so.

Q. Why?

A. Because it will strike the plate here and prevent it from swinging in.

Q. Have you seen an experiment made of taking out the bolts off the left hand side, leaving only one in there with a nut on it and then taking the burr off the bolt on the right hand side and letting [fol. 571] it drop down?

A. Yes, sir, I have seen it.

Q. And did you try to swing the carrier iron under the car?

A. Yes, sir, I tried it.

Q. Could you do it?

A. No, sir.

Q. Even if the bolt on your left hand side were long, as you say, with a play of two inches there, would it swing under there?

A. No, sir.

Q. Why not?

A. Because it could not; the strap would obstruct it, the support of the carrier would obstruct it.

Q. As to the shape of this angle iron carrier iron over on the other side where it is held up, would that have any effect on it?

A. Yes, it would.

Q. What would that have?

A. There was the same thing over on the other side, the support prevents it from turning.

Q. How far down did you see an experiment made whereby this carrier iron was dropped clear down so it would clear those supporting plates there and swing, did you see that experiment made?

A. No, sir.

Q. So that it went down below the plates?

A. We had, I think, something like an eight inch bolt in there and tried it with one nut on and we couldn't get it around.

Q. Had an eight inch bolt?

[fol. 572] A. Seven or eight inch bolt. Tried it first with a six inch bolt and tried it with seven inch bolts and I don't think we ever succeeded to get it under there.

Q. They didn't succeed in getting it under there at all? And if it did go under after it got down below that plate is there anything on which it could strike or catch?

A. No, I couldn't see anything.

Q. Could it touch the draw bar at all?

A. No, sir.

Q. So long as that draw bar, the end of it, the shank of it, is in its pocket, how far could it drop down even bent as you found it bent?

A. I don't know. I couldn't say as to that because I didn't try it.

Q. Ordinarily, with the carrier iron clear off, would your coupler drop clear down?

A. No, sir.

Q. And with it bent as you found it would it drop clear down?

A. No, sir, couldn't.

Q. How far would it go down?

A. I don't know how far it would go, but it couldn't go very far because the three long straps underneath held it up and it is all rigid, you know; the whole thing is rigid.

Q. In trying this experiment on the side that you had held up we will say, with the seven inch bolt, did you let it clear down as far as the bolt would let it go?

A. Yes, with one full nut on it.

[fol. 573] Q. And with the eight inch bolt did you try it with one full nut on?

A. I don't think we tried it with an eight, but we tried it with seven.

Q. With one full nut on it?

A. First six and one seven we could not get it.

Q. Did you try an experiment of trying to get your knee under this draw bar?

A. Well, I can't reach. I am too short for that.

Q. How tall a man are you?

A. Oh, I am about five feet four, I guess.

Q. Standing with your toe on the ground and raising up your leg did you try to see if your knee would reach the bottom?

A. Well, I would be lacking about a foot to get the coupler where it belongs.

Q. Did you see this draw bar weighed?

A. Yes, I seen the whole thing weighed.

Q. What did it weigh?

A. 681 pounds.

Q. What did that include?

A. That includes the coupler and everything that goes with it, the follower plates and springs, everything.

Q. Just the coupler proper, how much did that weigh?

A. That was four hundred and fifty something, I think.

Q. But in raising the draw bar from your long experience with them, knowledge of them, if you have to raise them up, they are still fastened back there in the pocket?

[fol. 574] A. Yes, sir.

Q. Do you have to raise the entire weight?

A. No, sir.

Q. About what proportion?

A. Better than one-third, I should judge.

Q. Take a draw bar of this weight, about what weight would you have to raise?

A. In this case I would judge between two hundred and two hundred and fifty pounds would be the lift, I think.

Q. Taking your foot off the ground, as you say you did, and trying to move that draw bar, could you move it?

A. I couldn't reach up.

Q. Well, I know, but if you took your foot off the ground you could get your knee up against it?

A. Well, I couldn't lift no two hundred pounds.

Q. Could you move it at all?

A. No, sir.

Cross-examination.

By Mr. Anderson:

Q. You didn't testify at the last trial, did you?

A. I did not.

Q. These photographs that you are talking about have just been taken this month; you never saw them until you came up here, I take it?

A. That is the first time.

Q. You had never seen this Lehigh Valley car with that number on since the time of the accident?

A. I seen it in Minneapolis, yes, sir.

Q. Until you went there to see it so as to prepare for this?

[fol. 575] A. Yes, sir, that is right.

Q. The same draw bar in that car that was in it in October, 1920?

A. I don't know.

Q. The same type of draw bar?

A. Same type of draw bar.

Q. What is the make of it?

A. The coupler itself you mean?

Q. Yes?

A. The one that is in now is the Simplex.

Q. Well, what was it in October, 1920?

A. I don't know.

Q. How much did the one weigh that was in there in 1920?

A. I don't know.

Q. Was it smaller than this, the same size or larger?

A. The same size.

Q. How do you know it was?

A. Because it had to be the same size in order to come back there and I knew what kind of a draft rigging was in it, you know.

Q. Was that vertical iron that we are looking at now on that car in October, 1920? (Counsel indicating on photograph.)

A. Yes, sir.

Q. How do you know it was?

A. Because I saw it there.

Q. How do you know it is the same piece of iron?

A. I don't know that it is the same piece.

Q. That is what I am asking you?

[fol. 576] A. I don't know, then.

Q. Is that the same coupler that was on there in 1920?

A. I don't know. I said that.

Q. Afterwards when you saw that car when that photograph was taken, it had been two and a half years, nearly, after this accident?

A. Yes, sir.

Q. And at the time this car came into Superior, that end of the car was in pretty bad condition, wasn't it?

A. Well, it was.

Q. It needed a pretty thorough over-hauling, didn't it?

A. No, sir, I didn't do much work on it.

Q. What did the Lehigh Valley people do after they got hold of it?

A. I don't know.

Q. You say the buffer block was broken, is that right?

A. That is right.

Q. And the buffer block in this iron thing-um-a-bob in here back of the coupler?

A. Yes, sir.

Q. Is that the same buffer block that was on before.

A. I don't know.

Q. Is it the same kind?

A. Yes, sir.

Q. Have the same shape?

A. Just about the same shape.

Q. How do you know?

[fol. 577] A. Well, I know.

Q. Do you remember from your inspection in October, 1920, or don't you?

A. That is practically the same thing because it is a common buffer block.

Q. Well, I know, but you know the Lehigh Valley people have taken off the whole buffer block?

A. Undoubtedly have done that.

Q. And put on a new one?

A. Sure.

Q. And may have put on a new kind, a new type?

A. They could.

Q. And couldn't they put one on with a different sized hole in it that the coupler goes through?

A. Yes, sir.

Q. And couldn't they reorganize the whole end of that car and put on a new coupler?

A. Yes.

Q. And they could put on new straps up and down?

A. They could.

Q. And instead of the flat carrier iron, they could have the T carrier iron, couldn't they? The T, isn't that what you call it commonly?

A. No, sir.

Q. What is it you call it?

A. Angle iron.

Q. They could put that kind on, couldn't they?

A. They could put another one on, of course.

Q. They could reorganize the whole end of that car since you saw it in October, 1920?

[fol. 578] A. They could.

Q. So as I understand it now, you are depending upon your memory of October, 1920, and your notes?

A. Yes, sir, that is all.

Q. And at the time this case was tried in September, 1921, you were the foreman down there, weren't you?

A. Yes, sir.

Q. And you had your records then?

A. Yes, sir.

Q. Had you given it to the claim department in connection with this case?

A. I think so.

Q. Had they talked with you before the last trial?

A. No, sir.

Q. Never talked with you about the condition of this car when you inspected it?

A. No, sir.

Q. When did they talk to you first?

A. I think it was on the 19th of this month. You knew about the time this case was coming up and was tried the last time?

A. I didn't know nothing.

Q. Nobody ever said a word to you?

A. Not a word.

Q. You know about the trial in September after it was tried?

A. No, sir.

Q. Where was this book in September, 1921?

A. In my office.

[fol. 579] Q. Do you mean to say the superintendent of the claim department, nobody ever came to you to ask you about this defective car?

A. No, nobody ever asked me for it. I sent it in, my report.

Q. Where did you send your report?

A. To the master mechanic.

Q. When?

A. November 1st, 1920.

Q. Why did you send it, by request? On account of the fact that somebody had been hurt, wasn't it?

A. Well, I suppose they called for an inspection and they got it.

Q. And when you say report, is that the one you are introducing here, this report?

A. Yes, just about the same thing.

Q. Now, in this you say that the car was inspected by you as foreman at 11.30 A. M., 10/29, that is right, is it?

A. Yes, sir.

Q. Found as follows: On B end, buffer block broken: that is that big block that you have reference to?

A. Yes, sir.

Q. How badly broken?

A. Broken in two, in the middle, about.

Q. Did you replace it with a new one?

- A. No, sir.
- Q. You left it on, didn't you?
- A. Yes, sir.
- Q. So far as you know this Lehigh Valey car was shipped home?
- [fol. 580] A. I don't know.
- Q. Was this an empty car?
- A. I think it was. I am not sure.
- Q. The practice is, when they are empty, to send them home?
- A. No, I think it was brought up for loading.
- Q. Well, for loading and then back east; in other words, they get the car back to the railroad owner as soon as they can?
- A. Yes, sir.
- Q. And if they are broken in such a way that you can patch them up and get them back to the original owners you do it, don't you?
- A. Yes, sir.
- Q. And let them fix them?
- A. All depends on how busy we are.
- Q. Were you busy at this time?
- A. I don't remember.
- Q. Buffer block broken, one end sill, two center sills on the B end was bent?
- A. Yes.
- Q. How much?
- A. Slightly; come from breaking the buffer block, in the first place, and striking the iron bent the end in.
- Q. And two center sills bent, where are they, underneath here so one is on either side of the coupler shank?
- A. Yes, sir.
- Q. Four horizontal carrier iron bolts missing?
- A. Yes, sir.
- [fol. 581] Q. How many were there not missing?
- A. They were all missing.
- Q. The whole thing was gone?
- A. Sure.
- Q. What held the thing up?
- A. The two vertical bolts was the only thing held the carrier.
- Q. Well, that coupler was pretty badly shattered, then, by the time it got to you?
- A. It was.
- Q. How about the draw bar about that time, how low down was that? I mean this crippled coupler?
- A. Yes.
- Q. It was at 31 and  $\frac{3}{4}$  inches high, crippled up that way, was it?
- A. It was that way when she come in.
- Q. Somebody had put on some bolts?
- A. Yes.
- Q. And you finished the job?
- A. Yes, sir.

Q. Photographs are rather deceptive; this draw bar looks like it is almost flat up against this car; it comes out here very materially?

A. Over a foot.

Q. And one thing certain, if that flat piece of iron was off, this could swing back, couldn't it?

A. Yes, if that were missing.

Q. Was it missing?

A. No.

Q. Are you sure?

A. It wasn't missing.

[fol. 582] Q. Sure?

A. Absolutely.

Q. Where are those four horizontal bolts that you are talking about where should they be here?

A. There is two there (indicating), and then on the other side would be two, you see.

Q. Two vertical carrier bolts missing, one in each end?

A. Yes, sir.

Q. So this was a carrier iron that in truth and in fact at the time had one bolt in each end?

A. Yes, sir.

Q. Two vertical carrier bolts too long?

A. Yes.

Q. One at each end?

A. Yes.

Q. That indicated to you as an expert that there had been some patching done there?

A. Sure; no question.

Q. Some car foreman didn't have the right kind of bolts, is that right?

A. Yes, sir.

Q. As you found this coupler and the appliances there at that time, I suppose, as a car foreman, if it had been a Soo car, you would mark that condemned, wouldn't you, the whole outfit?

A. No, sir.

Q. Except the draw bar?

A. No, sir. I would not; not with the end sill and the center sills; I would not have done anything to them.

[fol. 583] Q. Anyway, it was a pretty badly crippled up animal, wasn't it?

Mr. Palmer: Well, I object to that as irrelevant.

Q. Coupler or part, two bolts missing, two vertical bolts missing, four horizontal bolts missing, the two vertical carrier bolts too long, the one on the west side, south end, seven inches, badly bent?

A. Yes, sir.

Q. The coupler wasn't in shape to use, was it?

A. Not the way it was, no.

Q. Did you get it so you could use it?

A. Yes, we fixed it.

Q. You said it showed new nuts; by that you mean makeshift nuss, not brand new?

A. No, I meant that recently had been put on.

Q. They may have been as old as the hills, but they had been put on?

A. Yes, that is what it means.

Q. It showed new nuts in that meaning had been put on the only two bolts that were left?

A. Yes, sir.

Q. Looking again at this B end of the car, one of these bolts that still remained in this carrier was on the left hand side wasn't it, and one was on the right hand of the draw bar, coupler?

A. Yes, sir.

Q. Was there any nut put on the left hand bolt recently?

A. It looks as though they had been both tampered with.

Q. Couldn't that be accounted for by the carrier iron, the right [fol. 584] hand dropping down and the weight of the coupler coming on it and turning it and the thing being twisted around?

A. It looks as though a wrench had been used on it. That is the way it looked.

Q. Might have been that old bolt and trying to screw it up tighter, it was loose?

A. I don't know. Might have been, yes.

Q. Coming over to the right hand side of the coupler as you faced it somebody had put a nut on there recently?

A. I think both had been put on there recently, or if they had not been put on entirely or screwed up why they had been out anyway, because I could see that from the use of the wrench.

Q. Where is this seven inch bolt that is bent badly?

A. That is on the west side. On the left hand side, facing the B end, yes.

Q. Is that the vertical bolt?

A. That is the vertical bolt.

Q. Just as if the carrier iron had come loose at the right end and had been crushed down and bent the bolt?

A. I don't know anything about that.

Q. Well, just answer; just as if?

A. Yes.

Q. Let's take that nut off the right hand side so we won't have anything holding there at all and that heavy coupler on top of this carrier iron the carrier iron is loose at this end, going down?

A. Yes, sir.

Q. And of course the train is working more or less, that puts a [fol. 585] heavy strain upon the carrier iron?

A. Sure.

Q. That would have a tendency to throw the right end of the carrier iron down wouldn't it?

A. Yes, sir.

Q. That would have a tendency to bend the seven-eighths inch bolt, wouldn't it?

A. It is possible.

Q. And it could have been done that way, couldn't it?

A. It could have been.

Q. Now, let me see what you mean here: "And the two bolts mentioned were the only ones holding up the coupler on the outer end." Outer end, just explain what you mean by the outer end?

A. A coupler is held up in the back and the front.

Q. You say you found a coupler pocket bent downward; let us get at that pocket, where is it? Let's look back in this hold underneath back of this carrier iron?

A. Yes, sir.

Q. And we go back under there about how far to get to the pocket?

A. Oh, about thirty-two inches.

Q. About thirty-two inches before we get to the beginning of the pocket?

A. Yes, sir.

Q. Then how far back into the pocket do we go before we get to the end?

A. A little better than twenty-seven inches.

[fol. 586] Q. So when we get to the far end of the pocket back there, we are under the car nearly five feet aren't we, nearly sixty inches?

A. Well, this coupler sticks out about, oh, fourteen inches.

Q. And then we take that off from that?

A. Yes.

Q. What is the purpose of that pocket?

A. The pocket is to hold the springs and followers; that is, the spring rigging, where you are pulling them and shoving them.

Q. What holds the back end of the coupler shaft from dropping down?

A. There are two long straps running lengthways with the center sills.

Q. They hold up the shaft of the coupler?

A. The check of the pocket.

Q. Holds up the coupler?

A. Yes, sir.

Q. You say you found the coupler pocket bent downward; well, how much?

A. Oh, it wasn't much; just a slight bend in it.

Q. What do you mean, an inch, two inches, three inches or what?

A. No, not that much; just barely so you could see a kink on the end of the coupler there.

Q. What did you do with that pocket?

A. Used it.

Q. Bent it up again?

A. No, sir, it didn't need to be bent.

Q. You left that for the Lehigh Valley people to fix?

[fol. 587] A. I don't know who bent it. It was all right. We did not renew the pocket.

Q. "Showing the car had been run with coupler hanging down?"

A. Yes, sir.

Q. That is, the coupler was hanging down so that it would not meet and couple with the other coupler, that is it, isn't it?

A. That is what it means.

Q. And then it would pass the other coupler and what would it do to bend this pocket?

A. That is the way it bent the pocket, I suppose.

Q. But it was so low down it would pass under the good coupler on the other car?

A. I think so.

Q. And that would bend it?

A. Yes, sir.

Q. And in addition to that, the weight of the coupler itself would bend it down, have a tendency, I mean?

A. Oh, no, that ain't heavy enough.

Q. I mean it would help?

A. Oh, yes.

Q. The condition you found the pocket in, with the parts, would indicate to you that the draw bar on this car some time before it came to you was down so that the knuckle would be clear below the knuckle on the other car?

A. That is the way it looked to me.

Q. How long is one of these knuckles on these ordinary couplers up and down?

[fol. 588] A. Nine inches.

Q. So it would have to be down at least four and a half inches to pass, wouldn't it?

A. Yes, sir.

Q. And how much further it had been down, you don't know?

A. I don't know anything about it.

Q. You say one middle strap bolt missing; that is underneath?

A. Yes, sir.

Q. Another thing that holds up the coupler strap, is that right?

A. Yes, sir.

Q. One draw spring broken?

A. Yes, sir.

Q. Those are those big, powerful springs back there in the shank?

A. Yes, sir.

Q. So that when the cars come up against the coupler those springs take the shock off?

A. Yes, sir.

Q. And when you pull out the springs also prevent things coming out with a jolt; one of those gone; how many were left?

A. It wasn't gone; all left.

Q. It is no good when it was broken?

A. It is a double spring and only the outside was broken.

Q. This was an 80,000 pound capacity, steel underframe car, was it?

A. Yes, sir.

Q. It has been testified here by the plaintiff that on the 27th day [fol. 589] of October his train that he was a brakeman on broke in two because the draw bar dropped down so the knuckles separated; was this draw bar in that condition where that would occur

if you took the nut off from that one bolt left on the right hand side off from the carrier iron?

A. It would drop down, of course.

Q. Wouldn't it drop down so it would come uncoupled?

A. I don't know.

Q. In your opinion?

A. It might.

Q. At any rate, it would be pretty apt to do so with a seventy car train and kicking along with the jar wouldn't it?

A. Yes, it showed plainly it had been done that way.

Q. And if the draw bar dropped down four and a half inches, plus, in order to get by, as you think it did, the other coupler, the carrier iron had to go down also, didn't it?

A. Yes, sir.

Q. And is there anything to prevent the carrier iron slipping except the strap you refer to the vertical strap, slipping back under when it comes down? Take that strap away and take these bolts off and let this carrier iron drop down, is there anything to prevent the end of that working back under the draw bar, coupler?

A. I am not sure of it.

Q. What is there back there that would prevent it?

[fol. 590] A. I don't know if there is anything if you take the straps away.

Mr. Palmer: If you take the straps away?

A. If you remove the straps I suppose you could swing it. I would not say as to that, though.

Q. I notice here on this exhibit, whatever it is, 15, the strap we are looking at seems to be a good deal longer than the width of the carrier iron that is on there now?

A. Yes, sir.

Q. Any object in that?

A. I don't know what it is for unless they just happened to have the iron that long.

Q. You say those two bolts that the heads show there (indicating on photograph), were missing?

A. Yes sir.

Q. That is on both ends?

A. That is on both ends.

Q. That is, all the bolts were gone so far as supporting the carrier iron is concerned that there were the horizontal bolts in the whole outfit were gone?

A. Yes, sir.

Q. They could not get out suddenly, could they?

A. Could sheer off, you know.

Q. Is the same brake shaft support on this picture, was that on that car in October, 1920?

A. I wouldn't say as to that.

Q. The same brake staff?

A. I couldn't say as to that.

Q. The same type of coupler pin lifter?

[fol. 591] A. I am not sure of that either because, you see, I only

was out there looking after the coupler on the car. I didn't care about the rest of it.

Q. As a matter of fact, you went up there with the record from Superior and inspected that car and made your notes didn't you?

A. Yes, sir.

Q. Temporary notes, I take it, or did you have your books right with you?

A. No, sir, I did not.

Q. Then you transferred the notes to your book?

A. Yes, sir.

Q. And then you copied the book and sent in your report?

A. Yes, sir.

Q. And if you didn't have this book to refer to and didn't have any reports to refer to how much could you remember about that Lehigh Valley car?

A. Oh, just a little of it; probably half of it or something like that I could remember, maybe.

Q. You see a great many cars, don't you, every year?

A. Yes, sir, but you see I don't inspect cars every day. It is only occasionally.

Q. When the trial was being prepared for a year and a half ago you were not consulted?

A. No, sir.

Q. You were not asked any questions about this coupler?

A. No, sir.

Q. And the trial was going on here four or five or six days and [fol. 592] you were not consulted during the trial as the testimony went in?

A. Never knew anything about it.

Redirect examination.

By Mr. Palmer:

Q. Take an 80,000 capacity car, is that a large car or a small car, Mr. Greenseth?

A. That is a common car now-a-days. We get 60's and we get 100's.

Q. Something has been said here about these carrier iron plates here, were either of those plates gone when you saw that car?

A. No, sir. I would have taken it down because that would have been a very important thing.

Q. How badly was that buffer block broken?

A. It was broken in two, in the middle.

Q. Were these rivets still in there?

A. Yes, sir.

Q. And how much of a break was that, was it a cut or just a crack?

A. Just a crack, yes, cracked through.

ERNEST J. GONEAU, the plaintiff herein, recalled by defendant for further cross examination.

Cross-examination.

By Mr. Palmer:

Q. Mr. Goneau, at the former trial you testified in substance the same as you did upon this trial with respect to this carrier iron being a flat piece or strip of iron under the draw bar did you not?

A. I believe I did.

Q. With one hole in it?

[fol. 593] A. I thought there was one hole in it.

Q. And your testimony in general in respect to the construction of that carrier iron holding up the draw bar was in substance, the same as you have given here upon this trial?

A. Yes, sir.

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DONALD M. TRASK, on behalf of defendant, duly sworn, testified as follows:

Direct examination.

By Mr. Palmer:

Q. Your full name?

A. Donald M. Trask.

Q. Where do you live, Mr. Trask?

A. Minneapolis.

Q. How long have you lived there?

A. Practically all of my life.

Q. How old are you?

A. Twenty-seven.

Q. What is your business?

A. Mechanical draftsman.

Q. How long have you been engaged in that work?

A. Since April 15th, 1912, with the exception of twenty-six months in the service of the United States army.

Q. In what capacity were you in the service?

A. I went into the ordnance department and then I went overseas with the engineering department.

[fol. 594] Q. You have been engaged in this work of draftsman for some ten years?

A. Yes, sir.

Q. Have you some education along that line?

A. I have a high school education and four years in the night school, University of Minnesota, engineering college.

Q. By whom are you employed?

A. Soo Line.

Q. How long have you been with the Soo Line?

A. With one exception, since April 15th, 1912.

Q. And what does your work involve, Mr. Trask?

A. Locomotive and car design, reconstruction.

Q. Are you acquainted with this car known as Lehigh Valley 82182?

A. Yes, sir, I have seen the car.

Q. When did you first see the car?

A. A week ago last Monday. I don't remember the date.

Q. Where?

A. The Shoreham general shops of the Soo Line.

Q. Did you make a study of the car?

A. Yes, sir.

Q. With what object?

A. With the object of making drawing showing the construction of the end as far as the coupler, carrier iron and striking casting and end sill are concerned.

Q. I want to call your attention to these photographs, first to Exhibit 10, and ask you if that is a photograph of the car of which you made these drawings?

[fol. 595] A. Yes, sir, it is. That is, I made the drawings of the B end of the car involving those parts.

Q. I will show you Exhibit 14 and ask you if that is a photograph of the B end of this car?

A. Yes, sir, looking from the right side.

Q. And I show you Exhibit 15 and ask you if that is a photograph of the car of which you made this drawing?

A. Yes, sir.

Q. Which side is that?

A. That was the B end of the car looking from the left side.

Q. You did not make a drawing of the A end of the car?

A. No, sir, I did not.

Q. And tell us just how you made this drawing?

A. I made the drawing to show the end sill construction; that is, the construction where the striking casting is riveted to the end sill and the plates that project down to hold the coupler carrier iron and also the height of the coupler as I found it from the top of the rail.

Q. Where did you make this drawing?

A. I made the drawing in mechanical department headquarters, Minneapolis.

Q. Did you make any measurements of the end of the car before you made the drawing?

A. Yes, sir, I did.

Q. And recorded your figures?

A. Yes, sir.

Q. Have you the original figures as you put them down?

[fol. 596] A. Yes, sir.

Mr. Anderson: You don't need to go into that, John.

Q. Will you produce the drawing which you made of the B end of this car Mr. Trask? I show you this plat, Defendant's Exhibit

17, and ask you if that is the plat or drawing that you made at that time?

A. Yes, sir, it is.

Q. And you made that from the car itself?

A. Yes, sir.

Q. State what it shows?

A. It shows the end elevation of the car, together with the striking casting and the coupler carrying iron with the vertical bolts that hold it and also a partial side elevation showing the end and the coupler carrying iron striking casting and the height of the coupler from the rail as I found it.

Q. Which does the drawing at the right show?

A. The drawing at the right shows an end elevation of the car, shows the relative position of the five by seven coupler shank and the coupler carrier iron and the striking casting.

Q. What does the drawing at the left show?

A. It shows the side elevation of the striking casting, the coupler carrier iron and the vertical bolts holding and that partially support the coupler carrier iron as well as the height of the coupler from the rail.

Q. Is it true and correct?

A. To the best of my knowledge, yes, sir.

Q. You made it?

[fol. 597] A. Yes, sir.

Mr. Palmer: We offer it in evidence.

Mr. Anderson: No objection, in view of the car foreman's testimony.

(Exhibit 17 received.)

Q. Taking first the drawing at the right, will you show us the brake staff?

A. The brake staff runs from here over to here.

Q. You are showing these two long vertical lines that begin clear down at the bottom and running to the top of the car?

A. Yes, sir.

Q. Now, what are these apparent timbers that run, four of them vertical and then there are some that run rather slanting?

A. They are metal parts there used for reinforcement of the end of the car.

Q. What are they made of?

A. Steel.

Q. About what is their size?

A. I didn't measure those.

Q. Whether their height or otherwise?

A. I would say about three inches deep.

Q. And how wide?

A. They are Z sections. I don't know what the dimension of the Z is this way.

Q. The end of the car itself is of what material?

A. The end of the car is wood.

Q. It has both an end ladder and a side ladder at that corner of the car?

A. Yes, sir, it does.

Q. And which corner is that?

[fol. 598] A. That is the left hand corner of the B end of the car.

Q. Will you show us this striking casting of which you have spoken?

A. The striking casting is riveted to the end sill; that is through the end sill.

Q. Do the rivets show there?

A. Yes, sir, they do.

Q. How many of those?

A. Three on each side.

Q. What do they go through?

A. They go through the striking castings, the end sill and the vertical plates holding the carrier iron and also through an angle—they are riveted through there on that angle iron in back; is also riveted to the center sill on each side.

Q. Then it goes through first the striking casting then the end sill and the plates that support the coupler carrier iron and also these angle irons?

A. Yes, that would be four pieces that they are riveted through.

Q. Then this angle in back that you speak of to which they are riveted is fastened to the center sill?

A. Yes.

Q. I want to ask you about this end sill, what does that mean?

A. That is a channel section, steel channel.

Q. How wide?

A. Nine inch, fifteen pound channel.

Q. What do you mean by fifteen pound?

A. The weight is fifteen pounds per lineal foot.

[fol. 599] Q. About how thick is it?

A. The weight there is about five-sixteenths of an inch, I would say.

Q. Does the back or plate part of it come out at the bottom?

A. Yes, sir, has a flange at the top and bottom that projects about two and a half inches out from the back of the channel.

Q. That is why it makes sort of a channel arrangement?

A. Yes, sir.

Q. You say it is nine inches wide?

A. And nine inches high.

Q. How long it is?

A. That is nine feet, one and three-eighths inches.

Q. Is that about the width of the car?

A. Approximately. The car may run a trifle wider than that.

Q. This striking casting, where does that fit with reference to the channel in this steel end sill?

A. It is backed up against the channel and projects down about half an inch below the bottom of the channel section.

Q. It is fastened in between the two flanges?

A. Yes, it is until you get out to this point here (indicating);

then it drops down on the outside to about half an inch below the bottom of the channel.

Q. Then this hole in it that you see is what?

A. That is a cross section of a five by seven coupler shank.

[fol. 600] Q. That is where the coupler shank goes in?

A. Yes, sir.

Q. Is that sufficiently large so that it leaves some play back and forth for the coupler shank?

A. Yes, sir.

Q. I suppose that is necessary to give some little play in there going around curves and so on?

A. Yes, sir, that is necessary.

Q. Back of that the shank runs about how far?

A. Where the big part starts it is  $15\frac{5}{8}$  inches back of the part on the coupler that strikes the striking casting to where the big part sets where the coupler pocket is fastened or where it hooks over the large part of the coupler butt.

Q. Only fifteen inches?

A.  $15\frac{5}{8}$  inches.

Q. And that is where it hooks onto the coupler pocket?

A. Yes, sir.

Q. Then it runs how far back?

A. It runs back from there  $33\frac{3}{8}$  inches to the inside of the pocket.

Q. 33 inches besides this 15 inches?

A. Yes, sir, that is to the inside of the back end of the coupler pocket.

Q. And what is the size of the shank as it runs back in there?

A. That tapers back. I don't know just the exact dimensions. The size at the coupler carrier iron is five by seven. As to just the figures back there, I couldn't say.

Q. Will you show us on this drawing, Exhibit 17, these plates [fol. 601] which you have spoken of that support the carrier iron?

A. The plates are shown projecting below the coupler carrier iron here (indicating on drawing).

Q. The coupler carrier iron, what shape is that?

A. That is four by four by three-eighths angle iron.

Q. Can you tell us the length?

A. Nineteen and three-quarters inches.

Q. How is it fastened to these supports?

A. It is fastened by two vertical three-quarters by four inch bolts, on each side, and it is also fastened by two horizontal three-quarters inch bolts, on each side.

Q. The vertical bolts going through the horizontal portion?

A. Yes, sir. They go down through the striking castings.

Q. And through the horizontal portion of the carrier iron?

A. Yes, sir, they do.

Q. And the horizontal bolts, in turn, go through this carrier iron support plate?

A. Yes, sir, and through the angle iron; that is, they hold the angle iron carrier iron to the vertical plates.

Q. The horizontal bolts would go through the vertical portion of the carrier iron?

A. Yes, sir.

Q. These carrier iron support plates, will you show us just where those ran?

A. They run up behind the end sill for a distance of about eight [fol. 602] and a half inches, up beyond the lowest point of the end sill that runs up in back.

Q. Then how are they fastened?

A. They are riveted right through the end sill. The same rivets go through them that take the striking casting and also run through the end sill, these plates, and also the angle iron on the back.

Q. The same rivets which you have heretofore described?

A. Yes, sir.

Q. This side elevation, just tell us what that shows?

A. That shows the partial side elevation of the B end of the car, showing the height of the coupler from the rail, the distance of the coupler out from the striking casting; that is, the part that strikes against the striking casting and side elevation of the striking casting and the coupler carrier iron, as well as shows partially the vertical plates holding the carrier iron.

Q. Will you show us what indicates the height of the coupler from the rail?

A. The lowest portion of the coupler is  $27\frac{3}{8}$  inches from the height of the rail.

Q. Have you indicated it here by arrows?

A. Yes, sir, one shows that lowest point and the other figure,  $28\frac{1}{2}$  inches, shows the next lowest point of the coupler.

Q. Give us that distance from the top of the rail to the sill?

A. Approximately 32 and  $\frac{3}{4}$  inches from the bottom of the end sill to the top of the rail.

[fol. 603] That does not take into consideration the height of the rail?

A. No, it does not.

Q. What was the height of the rail there where you were working?

A. A 60 pound rail there, would be approximately four inches in height from the ground. A 70 or 80 pound rail would of course run a little higher.

Q. Will you show us this carrier iron supporting plates?

A. The carrier iron supporting plate comes from up in back here on the back of the end sill to a point five inches below the bottom of the end sill.

Q. Before I leave this Exhibit 17, have you indicated there the vertical and the horizontal bolts?

A. Yes, sir. The vertical bolts are shown running down here on each side and the horizontal bolts show here, indicated by these nuts that are on the bolt, because they run in a horizontal position.

Q. Showing you Defendant's Exhibit No. 18, what is that?

A. That shows the same as the larger drawing, only at a larger scale, showing more in detail the different parts as to the striking

casting, the coupler carrier iron and the plates that support the coupler carrier iron.

Q. It is designed to show those particular parts more in detail, you say?

A. Yes, sir, it is.

[fol. 604] Q. Did you make that at the same time as the other?

A. I did.

Q. And from the notes which you made from the car itself?

A. Yes, sir.

Q. Is it true and accurate?

A. To the best of my knowledge, it is.

Mr. Palmer: We offer it in evidence.

Mr. Anderson: No objection.

(Exhibit 18 received.)

Q. What is the scale of No. 17?

A. One inch and a half to the foot.

Mr. Anderson: What is that scale?

A. Three-eighths of the actual size of the car.

Q. Beginning with the large drawing at the right, will you show us just what is indicated there?

A. The striking casting is indicated here running up around and down and over there.

Q. Is this striking casting all one solid piece?

A. Yes, sir.

Q. Made of what?

A. Cast steel.

Q. You say this opening here indicates where the shank goes in?

A. Yes, sir.

Q. And what is the size of that opening?

A. The actual opening is  $9\frac{1}{4}$  by  $5\frac{3}{4}$ .

Q. And what is the actual size of the shank of the draw bar that goes through it?

A. Five inches high by seven inches wide.

Q. So that leaves how much play?

[fol. 605] A. A space of one inch and an eighth on each side here and an opening of three-quarters of an inch above the top of the coupler shank.

Q. On each side or just at the top?

A. Just at the top.

Q. Show us again the exact dimensions of this striking casting?

A. At the bottom here it is 21 inches wide and at the top is  $19\frac{7}{8}$ . It is eight and a half inches high. It projects one-half inch below the bottom of the end sill.

Q. About what is the thickness of it?

A. Three and a half inches from the point where the horn on the coupler strikes to the end sill. That is this point here (indicating). From this point out here back to the web on the end sill is three and a half inches.

Q. This large striking casting, how heavy is it?

A. That is about seven-eighths of an inch, I would say, where it is riveted onto the end sill and these ribs here as shown are three-quarters or seven-eighths inches thick.

Q. So it makes quite a solid, heavy affair?

A. Yes, sir, it does.

Q. These carrier iron support plates, show us those on this drawing on the larger scale?

A. Those run down here one-half inch below the bottom of the coupler carrier iron, indicated by that dotted line coming down there (indicating). They come over and are indicated by this dotted line running out in back of the end sill and indicates the end of those [fol. 606] plates and it follows the dotted line down to there (indicating).

Q. Give us again the height of those plates vertically?

A. Those plates are thirteen and one-half inches in height.

Q. How far do they come below the bottom of the striking casting?

A. They come five inches below the bottom of the end sill or four and a half inches below the bottom of the striking casting.

Q. How wide are they?

A. Five inches in width.

Q. How thick are they?

A. They are at least three-eighths of an inch thick.

Q. On this particular B end of the car?

A. Yes, sir.

Q. Will you show us again how they are fastened onto the end sill?

A. They are fastened with these three rivets on each side. Those rivets go through striking casting, through the end sill, through this plate that is at least three-eighths of an inch thick and through this angle iron in back.

Q. Did you observe the size of those rivets?

A. I think that they are five-eighths of an inch thick. I couldn't tell from the diameter of the head as they are driven.

Q. Steel rivets, are they?

A. I presume so.

Q. Have they nuts on the end of them or are they headed over? [fol. 607] A. They are headed over on both sides.

Q. You have shown the outside heads here, I suppose?

A. Yes, sir, that full line indicates the outside of the head as it is driven.

Q. How much below the vertical portion of this angle iron carrying iron do those plates extend?

A. You mean how far below the lowest part of the coupler carrier iron?

Q. Yes.

A. One-half inch.

Q. On both sides?

A. Yes, sir.

Q. Show us the coupler carrier iron?

A. The coupler carrier iron is this angle iron, nineteen and three-quarters inches in length.

Q. Tell us again what is the height of the vertical portion of this angle iron carrying iron?

A. Four inches from this point here to this point (indicating).

Q. And the width horizontally?

A. Four inches.

Q. And the thickness through it?

A. Three-eighths of an inch.

Q. And the length?

A. Nineteen and three-quarters inches.

Q. Have you indicated there the vertical bolts?

A. Yes, sir. They are these bolts running up through there, passing through this striking casting and down below having two nuts on each side.

Q. Two nuts at the end?

A. Yes, sir.

[fol. 608] Q. Two of them on each side. You have shown the top of the bolts up here (indicating)?

A. Yes, sir.

Q. What size are those bolts?

A. Three-quarter by four inch bolts.

Q. What was the size of the nuts?

A. Those would be three-quarter inch nuts; that is, they are not only three-quarters inch in diameter on the inside, but they are approximately three-quarters of an inch in height also. They may run 13/16ths.

Q. Show the horizontal to us?

A. The horizontal bolts are indicated right here on the side view.

Q. What size bolts are those?

A. Those are three-quarter inch bolts. I didn't measure the length.

Q. And how many nuts do those have on?

A. They had one on.

Q. How close they are in there is indicated here?

A. Yes, sir.

Q. About what is that distance?

A. Two and one-quarter inches.

Q. And the same above?

A. Yes, sir.

Q. Did you see some experiments made by taking out the two horizontal bolts and the two inside vertical bolts, leaving only the two outer vertical bolts?

A. When I saw it all the horizontal bolts were removed.

Q. How many of the vertical?

[fol. 609] A. Two of the vertical bolts.

Q. Leaving which ones?

A. The two outside bolts, as I remember.

Q. Now, did you see the nut taken off on the right hand side?

A. Yes, sir, I did.

Q. And did you observe the action of the coupler then?

A. Yes, sir.

Q. What did it do?

Mr. Anderson: Objected to as not competent, immaterial, wholly unavailable in the trial of this case, no proper foundation laid, particularly calling court's attention to the fact that the experiment was not and could not possibly have been made under the same conditions existing at the time of this accident.

The Court: Objection overruled.

(To which ruling plaintiff excepted.)

Q. What did the draw bar coupler do?

A. The coupler dropped about three inches when the nut was taken off on this side.

Q. What effect did that have on the carrier iron?

A. The carrier iron also went down.

Q. How far did it go down?

A. The first experiment I saw it went down, I would say about three inches at the center line of the coupler. And the carrier iron went down that far also.

Q. How did it stand with reference to this plate?

A. The top point of the coupler carrier iron was above the lowest [fol. 610] point of this plate.

Q. How much above?

A. I couldn't say.

Q. Did you observe whether the carrier iron would swing under the car?

A. It would not.

Q. Why?

A. On account of this plate holding it.

Q. What about its position on the right hand end, where it was bolted up?

A. There was one bolt in there with one slip nut and a three-quarter inch nut on the bolt.

Q. There was a bolt in there with a slip nut on it?

A. Yes, sir, as I saw it.

Q. How long a bolt?

A. Three-quarters inch in diameter by six inches long.

Q. I think that the bolt was left on on the left hand side?

A. Yes, sir.

Q. You had a six inch bolt in there with just one slip nut on?

A. One slip nut seven-eighths.

Q. Then the regular nut?

A. Regular three-quarter inch nut.

Q. Screwed on how far?

A. That was screwed on so you could see one-quarter of an inch of the lower end of the bolt.

Q. That was when it dropped down the three inches that you speak of?

A. Yes, sir.

[fol. 611] Q. Did you see an experiment made of dropping it down still further?

A. Yes, sir.

Q. How far down?

A. I would not say what the length of the bolt was, but there was one three-quarter inch nut.

Mr. Anderson: This is all received, your Honor, subject to my objection.

The Court: It is so understood.

A. I saw a bolt put in there long enough so that the coupler carrier iron would swing below the plates.

Q. Below both plates?

A. Yes, sir.

Q. What did it do with reference to swinging around under the car?

A. It swung around freely.

Q. But what was there at all to interfere with it swinging?

A. Nothing.

Q. How far was it down from the sill of the car?

Mr. Spooner: Which end?

Q. Both ends?

A. Well, there would be a difference there because when you drop that down and swing it around that carrier iron is at an angle of 45 degrees slanting down. Its own weight takes it down.

Q. It swings in there?

A. Yes, sir.

Q. Does it swing both ways? Was it swung under and out both?  
[fol. 612] A. Yes, sir, it was swung from here back to ninety degrees back of that point; that is, from the way it is shown there now, swung back again.

Q. Was there anything then to interfere with it in any way?

A. No, sir, there was not.

Q. And where was it with reference to the draw bar?

A. Well, sir, I couldn't say, but it was at least two inches below the lowest point of the draw bar.

Q. Did it sustain any weight then from the draw bar?

A. No, sir, it did not.

Mr. Anderson: The plaintiff moves to strike out all the testimony as to these experiments and results on the same grounds and takes exception to it.

The Court: Motion denied.

Mr. Anderson: Note an exception.

Cross examination.

By Mr. Anderson:

Q. This angle iron is approximately 20 inches long?

A. Yes, sir.

Q. Speaking now with reference to your experiments, if you left

the left hand end of this carrier iron supported by one bolt, and you let the right hand end drop down so that the middle point of the carrier iron is three inches below its horizontal plane?

A. Yes, sir.

Q. How far down will the extreme right end drop?

[fol. 613] A. It all depends upon the height of the left hand end.

Q. The left hand end remained on the bolt, didn't it?

A. Yes, sir, but I couldn't say how far up, how close to the car, the top portion of that angle iron came.

Q. Don't you know how tight you had it screwed up when you made the test?

A. I don't know what space there was in there. There was one three-quarter inch slip nut and a three-quarter inch nut on the end of the bolt.

Q. Both experiments?

A. No, sir.

Q. You are talking about the last experiment now?

A. No, sir, the first one.

Q. You had two nuts on the one bolt on the left side?

A. One slip nut and a three-quarter inch nut.

Q. How close were they when you screwed them on, how close was the end of the carrier iron to the top?

A. I didn't observe the distance.

Q. Then you are not in a position to tell how far the carrier iron did actually drop?

A. Only at the center.

Q. But do you mean to say it dropped three inches approximately or that it was three inches down from the vertical line it occupies when in use?

A. Yes, sir.

[fol. 614] Q. Three inches down from the line it occupies originally?

A. Yes, sir.

Q. When it goes down that far the bolt on the left nut was screwed tight enough so that the end of the carrier iron would be pressing against the top wouldn't it? Tell me what stopped the angle iron from dropping?

A. The size of the hole in the coupler carrier iron.

Q. What is your judgment? What did stop it?

A. It was binding on the bolt, to the best of my knowledge, at the hole.

Q. How about that larger nut, the left nut, was that touching the top or not?

A. No, sir, it was not.

Q. Are you sure? Did you look?

A. As I remember it, it wasn't touching the top.

Q. Did you look, did you have that in mind?

A. I was right there.

Q. Were you asked, did you take part in the experiment?

A. I watched the experiment.

Q. We will assume now when the carrier iron dropped down so

that the center line was three inches below the work line, where it is screwed up and working there tight?

A. Yes, sir.

Q. And we will assume that the left hand end at that angle was up and pressing against that thing it is bolted to, the striking casting?

A. It is bolted up through the striking casting.

[fol. 615] Q. That piece that the horizontal bolts go through goes in behind the sill also, doesn't it?

A. Yes, sir.

Q. That is held by the three rivets. When the carrier iron is in position it is up against the bottom of the striking iron?

A. Yes, sir.

Q. We will take the left hand end of the carrier iron, with the center dropped down three inches and the left hand extreme end, upper surface, pressing against the bottom of the striking iron. Then how low is the right hand end of that?

A. Well, as I remember, that condition did not exist.

Q. Well, I know; let's make it exist now.

A. About four and a half inches, I would say.

Q. What are you basing that answer on, on your experiment?

A. On its degree of angularity.

Q. But you said in your testimony that end was down at least four and a half inches on your test? That is a straight piece of iron, isn't it?

A. Yes, sir.

Q. Sloping down so that the center line has dropped three inches, the center of it, ten inches from the extreme left hand end?

A. Yes, sir.

Q. In getting it down to that point, three inches, we pass over ten inches?

A. Yes, sir.

Q. Just keep on with the same ratio and pass over the other ten inches and you are bound to have the next end down six inches aren't [fol. 616] you?

A. I don't believe, in my judgment, that way, if the top of the angle iron was binding.

Q. Doesn't need to bind, just touch?

A. If it was touching nothing so it would stop it, I don't believe it would drop three inches at the center, if the bolts were screwed up enough.

Q. I want you to make a test for us?

A. Yes, sir.

Q. Let's have the hole large enough to make it an inch hole that won't bind?

A. Yes.

Q. Then when you get it down so the upper surface of the left hand touches the bottom of the striking iron, then bring it down so that the center is down three inches?

A. Yes, sir.

Q. How low is this end down here?

A. Six inches.

Q. Why, of course, and if the center line drops four inches, then the loose end will be down eight inches?

A. Yes, sir, under that condition.

Q. And all you had to do was to drop the right end low enough so it will miss that vertical plate in order to push it back under the car?

A. No, sir.

Q. Why not?

A. Because the left hand plate is five inches wide and that was too great to allow that carrier iron to go back under.

Q. What plate?

[fol. 617] A. The left hand vertical plate.

Q. Which plate was on at the time of the accident?

A. I don't know anything about that at all.

Q. I suppose you don't know how tight up the nut was screwed on that seven inch bolt that the car foreman said was on there?

A. No, sir.

Q. You don't know but what that seven inch bolt was down too?

A. No, sir.

Q. The whole thing may have been hanging loose there so you could flip it around anywhere, isn't that about right, as far as you know?

A. It is very clear if it was low enough to swing around it would swing around.

Q. Under the conditions that I have described here, making this test we are making, when you get the carrier iron down six inches, it will clear this vertical plate over on the right?

A. Yes, sir, it will.

Q. It will clear it if it is down five inches?

A. Yes, sir.

Q. You start your plate and force it back underneath and then will that swing it to the left?

A. No, sir.

Q. What stops it?

A. You are speaking of swinging the lower end at the right hand side?

Q. Yes, carrier iron?

A. The right hand plate being five inches wide is wide enough to stop that carrier iron, keep it from going around in back there.

[fol. 618] But stop it when? How far will it go before the plate will stop it?

A. Why, a matter of two inches.

Q. You mean the right hand end?

A. Yes, sir, two inches back of its normal position.

Q. Then if you force it further what will become of the plate over here on the left?

A. The plate, in my estimation, will remain there.

Q. Wouldn't it bend?

A. No, sir.

Q. Wouldn't it give?

A. No, sir.

Q. Why not?

A. Because the bolt, being a lighter construction, would bend first.

Q. I understand the testimony of the car foreman is that the  $7\frac{1}{8}$  inch bolt was badly bent at the time he saw it. His testimony was, speaking of the bolt on the west side, south end, 7 inches, badly bent; so that, if this carrier iron at the time of the accident dropped down and then the power and force exerted in the handling of the train forced it back and the left hand or south end is being held by a seven inch bolt—that means seven inches long doesn't it?

A. Yes, sir.

Q. Then the leverage there would badly bend that bolt, according to the force exerted, wouldn't it?

[fol. 619] A. You are speaking of a condition that could not exist, as I understand. I cannot see what force there could be on that angle iron to get it back in that position. I cannot see what would hit it.

Q. When the draw bar drops down, as you said, in this test three and a half inches, there is the big draw head outside hanging down, isn't it?

A. To a certain extent.

Q. If the carrier iron is down three inches in the center, the outside head of this big draw bar is down more than three inches, isn't it?

A. Oh, yes.

Q. It reaches out there about a foot or fourteen inches. Now, it is down there; if you will take and follow back the shaft underneath, is it on a level plane or does it slope back and up?

A. It slopes back and up, but that is above the point where the coupler carrier iron would be.

Q. You mean the carrier iron would be over from it?

A. Yes, sir.

Q. On your test it was?

A. Yes, sir.

Q. Was it at the time of this accident?

A. I don't know.

Q. Wasn't there a train being operated, seventy cars, you have heard that?

A. Yes, sir.

Q. And even empty cars weigh how much?

A. Empty cars will weigh approximately one-half of their capacity.

[fol. 620] Q. So if you have a 40,000 pound capacity car, you have got a 20,000 pound empty car?

A. Yes, sir.

Q. And when you are handling a train and pulling it and backing and jerking and the draw bar has dropped down, the angle iron, and you come back against that draw bar sloping down that way, doesn't it ram down against that carrier iron that is loose?

A. It would hit the plate. There is a plate that supports that draw bar.

Q. You mean the pocket plate?

A. There is a wide plate that runs across the center sills.

Q. Yes, down underneath there?

A. Yes, sir. The experiment that I saw the coupler dropped at that point around three and a half inches and did not go any further.

Q. But if you would have a seventy car train against it when you made that test and you rammed that train back against the draw bar, would it still remain three and half inches?

A. I couldn't say.

Q. What is your judgment as mechanical draftsman?

A. I would not venture to say.

Q. Would that coupler that is hanging down be so accommodating as to still stay there, not touching the carrier iron, with hundreds of thousands of pounds coming back against it?

A. Depends upon how far your coupler had dropped.

Q. You have got it dropped for you now three and a half inches? [fol. 621] A. The blow would go comparatively on a horizontal line. Of course, the more you drop it the more it would increase the tendency to buckle there.

Q. You remember the car foreman testifying, you were here?

A. I was here part of the time, yes, sir.

Q. You heard him testify, did you not, that the condition of this steel plate at the end indicated to him that the draw bar coupler heads had passed each other, one above the other; in other words, that it had been down far enough so that one of them went completely past the other underneath?

(No response.)

Q. Assuming that he so testified, that would mean the good coupler went over the top of the coupler hanging down, wouldn't it?

A. Yes, sir.

Q. And if it did would strike the top and bend that down further, wouldn't it?

A. Yes, sir, but I also heard the testimony that that coupler pocket was not changed.

Q. By him?

A. Yes sir. For that reason, it seems quite improbable to me that it would be possible for a coupler to drop low enough to pass under another one and yet not have to be changed.

Q. Then you, as an expert draftsman, have some little question about the correctness of the car foreman's conclusion, is that right? [fol. 622] A. I can't understand just exactly how that would happen.

Q. When that great force is applied under the conditions I have outlined, the draw bar down and being forced to strike the carrier iron, wouldn't it have a tendency to force it back under the car?

A. No, sir, not to my judgment. Nothing that is there that I could see that would force it back.

Q. It would always stay right there?

A. Could force it down, but if the weight of the coupler was still on there it would have no tendency to go back because the angle is not great enough.

Q. You mean the angle of the shank as it is hanging down?

A. Yes, sir.

Q. If it went down at any time in connection with this accident two and a half years ago so the good coupler would pass over the top, it would have to be down nine inches anyway, wouldn't it?

A. I guess it would have to be down more than that.

Q. So that if the draw bar went down nine or ten inches, the shaft that we are talking about, instead of being at a comparatively slight slope when it is down three and a half inches, would be a slope more like this, wouldn't it (counsel indicating)?

(No response.)

Q. Fourteen inches and as it comes down it presses against it, but the thing is working on an upward slope back?

A. No, I can't say to the best of my judgment, that that would work back that way.

Q. That loose carrier iron would stay there, don't make any difference [fol. 623] once what happened?

A. No.

Q. Just tell me how you could move it, then?

A. Well, under conditions of that kind, I can't see that there is anything to work that back there.

Q. No.

A. Supported by one bolt.

Q. Even though that bolt is badly bent?

A. If the weight of the coupler be on that coupler carrier iron, why, I don't see where it would have any tendency to push back. I can't see that.

Q. That seven inch bolt was three inches too long, wasn't it, according to the standard bolts you found in here the day you examined it?

A. It all depends upon the number of slip nuts. Yes, sir.

Q. Four inch bolt, isn't it?

A. Yes, but that would not make any difference as to the functioning; just take another slip nut, that is all. Might be too long according to the general standard.

Q. If it was screwed up properly, it wouldn't make any difference, of course. You never saw this car before February of this year, did you?

A. No, sir, I never did.

Q. And you don't know when these parts that you have been describing were put on this car?

A. No, sir, I do not.

Q. And that is one of the great branches of railroad expense and work, consisting, namely, of constantly repairing, overhauling and remodeling cars, isn't that true?

[fol. 624] A. Some things, yes, and other things they don't.

Q. Do you happen to know when the time limit expired for chang-

ing freight cars to comply with the order of the Interstate Commerce Commission and the law of 1910, went into effect in July, 1911?

A. No, sir.

Q. And so far as you know as to this car, of course, you don't have any knowledge whatever as to whether these various things you are describing were on this car in October, 1920?

A. No, sir.

Mr. Palmer: Counsel calls my attention to the fact that I did not offer both 17 and 18 in evidence. I wish to do so at this time.

Mr. Anderson: No objection.

(Defendant's Exhibits 17 and 18 received.)

FAY MOSSA, one behalf of defendant, duly sworn, testified as follows:

Direct examination.

By Mr. Palmer:

Q. Where do you live, Mr. Mossa?

A. Sayre, Pennsylvania.

Q. How long have you lived there?

A. About twenty-nine years.

Q. How old are you?

A. Fifty-four.

Q. Man of family?

A. Yes, married.

Q. What is your business?

[fol. 625] A. Car foreman in the car shops at Sayre.

Q. For what company?

A. The Lehigh Valley Railroad Company.

Q. Is that an eastern road, Mr. Mossa?

A. Yes, sir.

Q. Where are their headquarters?

A. Their main shops are at Sayre. Their headquarters is at Bethlehem, I think, Pennsylvania. It is about maybe 150 miles west of New York.

Q. How long have you been car foreman for the Lehigh Valley?

A. About twenty years.

Q. What do your duties involve, Mr. Hanson?

A. Supervising car work.

Q. What kind of car work?

A. All kind of freight.

Q. Do you have anything to do with the construction of cars?

A. Yes sir. For the last sixteen years I have had charge of their work at outside points where they were building new work, manufacturing plants.

Q. Where you have new cars built?

A. Yes, sir.

Q. Outside of Sayre?

A. Yes, sir.

Q. I take it, then, that you are familiar with the cars constructed by and in use by the Lehigh Valley Railway Company?

A. Yes, sir.

Q. And you have been for some twenty-nine years?

[fol. 626] A. Yes, sir.

Q. Prior to the time you became foreman what was your work?

A. I was a farmer.

Q. Are you familiar with this car known as Lehigh Valley No. 82182?

A. Yes, sir.

Q. How are box cars designated?

A. By the numbers, as a rule.

Q. Is there any other way of designating cars?

A. Well, when you mention a car 82182 a man that is familiar with it would know what style of a car that was. He would know whether it -as a box car or coal car and the general construction of the car and everything. That is, I would.

Q. You don't name a box car?

A. Yes, you say box car 82182, that would be all right.

Q. How long have you known this Lehigh Valley box car No. 82182?

A. Since the winter of 1906 and '7.

Q. How did you first come to know it?

A. I was sent to Madison, Illinois. The Lehigh placed an order there for 500 box cars to be built and I was sent there to supervise the work. I had the cars built according to their drawings and specifications.

Q. Can you give us the numbers of those five hundred box cars, that is, the limits?

A. They ran in series from 82151 to 82650, inclusive.

[fol. 627] Q. Was this Lehigh Valley 82182 one of those cars?

A. Yes, sir.

Q. What did you have to do with the construction of it?

A. I was to see that those cars were built according to our drawings. I had full charge of the work as far as accepting the cars and seeing that the work was done properly.

Q. Were they all made alike?

A. Yes, sir.

Q. And that work was completed about when?

A. It was completed in January, 1907, the last of the cars.

Q. Have you seen this Lehigh Valley 82182 recently?

A. Yes, sir.

Q. Where did you see it?

A. I saw it first in Minneapolis at the car shops a week ago today.

Q. Have you seen it since that?

A. Yes, sir.

Q. Where?

A. It stands down here by the station somewhere?

Q. It is here in Bemidji, is it?

A. Yes, sir.

Q. I show you this Defendant's Exhibit No. 10 and will ask you if that is a correct photograph of that car Lehigh Valley 82182?

A. I should say so.

Q. You know its original construction?

[fol. 628] A. Yes, sir.

Q. Will you compare its construction now with its original construction?

A. In 1918 those cars had new ends put in them that is, in the super-structure, what we call an indestructible end. The end of the car that is above the under-frame.

Q. What are those up and down pieces that we see on that car?

A. Those are Z bars.

Q. When were those reinforced ends put in there?

A. In that particular car it was done in August, 1918.

Q. Where?

A. Sayre.

Q. Did you have supervision of the work?

A. Yes, sir.

Q. In August, 1918, was there any change made in the construction of the draft rigging and the end sill?

A. No, sir.

Q. Any other change from the time it was constructed until now except the putting in of the reinforced end?

A. No, sir. practically the same as when it was built, the draft rigging and attachments.

Q. I show you Defendant's Exhibit 14, a photograph of the right hand side, the B end of that car. Do you observe the carrier iron there?

A. Yes, sir.

Q. What shape is it?

[fol. 629] A. It is all right. It is an angle iron carrier iron.

Q. What kind of a carrier iron was put on there when the car was constructed?

A. The same as it is now.

Q. Has there, to your knowledge, ever been any change in the shape and form of that carrier iron?

A. No, sir.

Q. Since it was constructed. How is that carrier iron supported?

A. By eight bolts, four horizontal and four vertical three quarter bolts.

Q. What are the vertical bolts fastened to?

A. The vertical bolts go through the buffer casting, down through the carrier iron.

Q. Will you show us that carrier iron support there on that photograph?

A. This plate which projects down past the vertical portion of the carrier iron.

Q. How long have those plates been on there?

A. They were put on when the cars were built. That was the construction of the car when it was built.

Q. How about the angle iron carrying iron?

A. The same.

Q. How about this end sill, which the draftsman has spoken of as a channel iron?

A. That was the same.

Q. As when it was originally constructed?

A. Yes, sir, nine inch channel.

Q. How about this buffer block which the draftsman has described here?

A. That is the same.

[fol. 630] Q. As it was originally constructed?

A. Yes, sir.

Q. How about the putting in of these three rivets?

A. That is the same.

Q. I show you this Exhibit 18 showing the construction here, will you point out the carrier iron supports?

A. Those plates there (indicating). This dotted line will show how far they extend up back of the end sill. Those three rivets secure them.

Q. What do those rivets go through?

A. The buffer casting and the end sill and this carrier iron support plate and also a small angle brace on the back side that is fastened to the draft sill.

Q. Is that the original construction?

A. Yes, sir.

Q. These plates, how heavy are they?

A. About three eighths by five by about thirteen inches long.

Q. Are they all one solid piece?

A. Yes, sir.

Q. Riveted in there?

A. Yes, sir.

Q. Has that construction ever been changed in any manner on that car?

A. No.

Q. I show you No. 15, what does that show?

A. That shows the B end of the car on the left of the center.

[fol. 631] Q. Does it show the construction the same as the car was originally built?

A. Yes, sir.

Q. I show you these two photographs, No. 13 and 11 and will ask you if those show this same car?

A. Show the same car on the other end, the right and left view.

Q. We will say that the two horizontal bolts on the right hand side are gone and one of the vertical bolts on one side and the two horizontal bolts are gone on the left hand side and one of the vertical bolts and that the nut is off on the right hand side, causing the draw bar to sag down on that side, I want to ask you if it would be possible for that carrier iron to swing around under the car to any extent parallel with the draw bar?

A. Not unless that end that has the bolt in with the nut on was low enough so it could get under one of those carrier iron supports, allow the carrier iron to drop down below that.

Q. You mean clear down below?

A. That plate.

Q. The plate on the left hand side, as well?

A. Yes, sir.

Q. If it were up at all on the left hand side above that plate, could it swing under?

A. No, the plate could bind; it could bind on that plate and would not allow it to.

Q. Suppose it were down, we will say, entirely free of that plate on the left hand side, where would the carrier iron be?

[fol. 632] A. It could swing then. If that plate did not obstruct it *is* could swing anywheres. There would be nothing; that could swing free around anywheres.

Q. Would there be anything on which it could touch or stick or bind in any way? It would be supported by this plate, I suppose?

A. Yes.

Q. And would it still swing perfectly free in the air?

A. Yes, if it was below that.

Q. And in that position could it touch the draw bar at all?

A. I don't think as low as that that a draw bar could get down that far because it is supported back under the car by the guide straps. I don't believe it could, if the carrier iron was down far enough to be below these carrier iron supports. The straps back in there that holds the pocket up would hold the draw head so it would not touch the carrier iron.

Q. Wouldn't touch the carrier iron. I see. I notice on this picture here, Exhibit 10, Mr. Mossa, seems to be stenciled on there, "built," as nearly as I can make it out, "1910."

A. That is something that happens once in a while with cars. When these cars are repainted, of course, the stenciling is all obliterated and when re-stenciled, the man that stenciled that on might have made a mistake. The car was built in 1906 and '7, that I know.

Q. Well, when was this car repainted?

[fol. 633] A. It was repainted in 1918, anyway. I don't know as it has been repainted since.

Q. When this end construction here on the super-structure was changed in 1918, then the car was repainted?

A. Yes, it was given a general overhauling, had a new roof, new ends and repainted I suppose and pui out as good as a new car, you see.

Q. Has there been any changes or reconstruction, anything of that kind, made in the car since 1918?

A. Not to my knowledge.

Q. Would you know it if there was?

A. There might be light repairs, running repairs, but that hasn't had no general repairs since 1918.

Q. From your inspection of this car as you saw it at Minneapolis, as you say, and again here at Bemidji, has there been any change

in the construction of the carrier iron and its supports, these plates and the general draft rigging?

A. No, sir.

Q. Since it was constructed?

A. No, sir, that is the way it was made. That is practically the same now. If there has been any repairs made they have been made the same as they were.

Cross-examination.

By Mr. Anderson:

Q. I don't suppose you have tried to see what you could do with that carrier iron when it was down at one end and loose at the other end, down far enough to pass the vertical support?

[fol. 634] A. No, I never made no trial of it.

Q. How thick is that vertical supporting iron?

A. Three-eighths thick.

Q. And made of what?

A. Steel.

Q. Bendable?

A. Yes, sir.

Mr. Palmer: If your Honor please, this car is here near the depot, readily accessible to the court room and the court house, and I think it would be helpful to the jury and assist them in understanding the testimony if they could have a view of the car itself, and we therefore make the request of the court that the jury be permitted to have a view of the car itself at this time.

The Court: Any objection?

Mr. Anderson: No, your Honor, that is entirely up to your Honor.

The Court: Well, inasmuch as the car is here, it might help the jury to understand the testimony. That would be the only object of the inspection.

Mr. Palmer: Would your Honor care to go down with the jury also?

The Court: I don't think so.

Mr. Spooner: We would like to have the court go.

The Court: There is really nothing that I care to see about it, I don't think.

Mr. Anderson: It is understood, of course, that the sheriff alone will go with the jury and nobody else?

[fol. 635] The Court: Yes.

The Court: Gentlemen of the jury, the court is advised that the car in question, Lehigh Valley Railroad Company box car No. 82182, is on some of the railroad tracks in this city at this time and request has been made that you be permitted to view it. I have concluded to grant that request. I wish to say to you that your inspection of the car, your view of it, is not evidence in the case. You are permitted to view it in order that you may perhaps better understand the testimony that you have heard or may yet hear during the trial of the case. You will be taken to the car by the sheriff and you will

be expected to be accompanied by no one else and you will not be expected to enter into any discussion among yourselves of the car. Simply go there and look at the car to your satisfaction and then return to the court. Do counsel wish to suggest any further statement by the court?

Mr. Anderson: I have no suggestion; perfectly satisfactory.

Mr. Palmer: No, your Honor.

The Court: Mr. Sheriff, it is the desire of the court that you take this jury to some point on the railroad tracks here in the city where there is located a certain railway box car. The car is marked Lehigh Valley Car No. 82182. You will take the jury to that car, keeping them separate from other persons, and permit them to view the car to their satisfaction, and after you have finished the inspection you [fol. 636] may let them go as they see fit and they understand that they are to appear here in court at 1:30 this afternoon. I will endeavor to swear you: You do swear that you will take charge of this jury and take them to a certain box car which I have just described to you, in this city, and permit them to inspect it, view it, to their satisfaction. That while they are so in your charge you will not permit them to be accosted or to enter into conversation with any person and that you will endeavor to keep them free from association with any other person while in your custody for that purpose. So help you God.

The Sheriff: I will.

(The jury thereupon went with the sheriff to view the car in question.)

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GEORGE P. ZACHRITZ, on behalf of defendant, duly sworn, testified as follows:

Direct examination.

By Mr. Palmer:

Q. Where do you live, Mr. Zachritz?

A. I live about six miles from Minneapolis in the Lake Minnetonka district.

Q. On a farm there?

A. I have a few acres there, yes, sir.

Q. How old are you?

A. Fifty-nine.

Q. Man of family?

A. Yes, sir.

Q. Have you a business?

A. General car inspector, Soo Line.

[fol. 637] Q. How long have you been general car inspector for the Soo Line?

A. First day of October, 1899.

Q. What did you do before that?

A. For some years I was general car foreman, Sault Ste. Marie,

Michigan, from April 27th, I think the date was, 1895, to October 1st, 1899.

Q. You have had a good deal of practical experience, then with cars?

A. I have been connected with the car department a little better than forty years.

Q. And what are the duties of a general car inspector?

A. To instruct car foremen and inspectors on rules or any other change and our practice on lubrication inspection and repairs to cars, and such other duties as may be assigned by the general mechanical superintendent.

Q. You had occasion to make an inspection of what is called Le-high Valley car 82182?

A. Yes, sir, it was last Friday, I think.

Q. Where?

A. At our shops at Shoreham, in Minneapolis.

Q. I show you this photograph, Defendant's Exhibit 10, is that the car?

A. Yes, sir.

Q. Have you seen that car since you have been here?

A. Yes, sir.

Q. Where?

A. Down in the Soo Line yard, near the freight house in Bemidji. [fol. 638] Q. Is that the same car of which you made this inspection?

A. Yes, sir.

Q. I show you Defendant's Exhibit 14, what is that?

A. This is the right side of the—of a coupler on a car.

Q. Of that car, did you say?

A. It is very similar to the car that I inspected at Shoreham. Of course, I don't see any number to designate it here. The same construction.

Q. No. 15, what does that show?

A. This is the B end of the car.

Q. That shows which side?

A. That shows the left side of the coupler and attachments.

Q. Did you look at the A end of that car?

A. Yes, and casually inspected it.

Q. I show you No. 11?

A. That is the A end of a car of the same construction.

Q. At which side?

A. Right side of the coupler as you face it.

Q. What is that?

A. That is the same thing on the left side as you face it.

Q. This last one I showed you is Exhibit No. 13?

A. Yes.

Q. Just describe what kind of a construction you call that carrying iron?

A. The carrier iron itself was an angle iron carrier iron, made [fol. 639] from a piece of angle iron four by four.

Q. It has been quite fully described here and the number of bolts that it has been fastened with?

A. Yes, sir.

Q. That is the way you found it, is it?

A. Yes, sir.

Q. Is that a common type of carrier iron?

A. Cars of that construction, yes, sir. Under the old equipment; that is, the wooden draft timbers, the carrier irons were very largely made up of flat iron, turned up at the ends to prevent the spread of the draft timbers in front, but on more modern equipment they changed from the flat carrier iron to the angle iron carrier iron.

Q. What is the purpose of that?

A. The projection that comes down from the top of the carrier iron added strength to the construction.

Q. When you saw and inspected this car you found the bolts in place, did you?

A. They were all in place, yes, sir.

Q. I will ask you, if you saw any experiments made with it?

A. Yes, I was called on to make an inspection of the car and to carry out the experiment, along with other persons selected to go with me.

Q. Tell us what you did?

A. We removed the horizontal bolts from the carrier iron and then we removed all of the perpendicular bolts and in the place of the standard bolts we applied bolts that were too long. The standard [fol. 640] bolts were three quarter by four and a half, but we put in seven inch bolts in place of those four and a half bolts and then we first tried by taking off a nut from the bolt on the right hand side and putting a one inch slip nut on the three quarter bolt, then running the three quarter nut up to a full thread.

Q. On which side?

A. On the left side. Then we let the carrier iron down to see if that carrier iron would swing under the car. We found with that arrangement that the carrier iron would not swing on account of meeting with an obstruction in these carrier iron supports.

Q. On which side?

A. On the left side. Then afterwards we removed the slip nut and merely put a three quarter nut on with practically a full thread and then we dropped the carrier iron and it would swing by the support and swing somewhat under the car. And you could turn it either forward or back.

Q. Why?

A. Because there was nothing to obstruct it. It was clear of the supports. With practically a full thread with the three quarter nut on the left hand bolt.

Q. How would it swing, as to whether it would swing easily or not?

A. It swung fairly easy, yes.

Q. Was there anything on which it could catch?

A. No, sir.

Q. Anything to engage it or touch it in any way?

[fol. 641] A. No, sir.

Q. With reference to the draw bar, where was the draw bar?

A. When we dropped that carrier iron to the position to which we dropped it, the draw bar did not touch it.

Q. Why not?

A. Because it was held up from the back end. In the rear end there to take the buffing and strain we have a spring draft rigging that is comprised of four follower plates and two springs. There are several lugs riveted onto the draft members, that is, the steel draft timbers, and they are spaced so that two of these followers and one of the springs fills up the edge of these spaces. There are two of those spaces; in fact, there are three of those side lugs riveted onto each side of the draft members. The center one is square on both sides because it has to engage a follower plate, front and back, and the front one is secured on the back end and the back one is secured on the forward end, so that on the front end when the pulling strain is put on the follower plates engage the side lug, the forward side lug on the back end and the center side lug on the back end and on a buffer strain or a pushing strain the follower plates engage the rear lug on the front end and the center lug on the front end. These followers and springs are all encased in what we term a draw bar pocket. That pocket is riveted onto what we call the coupler butt. That is a projection of the shank. It is somewhat larger than the shank and there is two rivet holes go down through this butt, [fol. 642] usually from an inch and an eighth to an inch and a quarter. I think that has two M. B. C. sizes and the pocket is solidly riveted to the coupler butt with these two rivets. Then there is a five inch center filler, made from malleable iron that is riveted in the center between these two groups of follower plates and springs. That is to fill out the space in the pocket between these two groups of springs so that there will be no slack in the pocket.

Q. How deep is this coupler pocket?

A. The pocket itself between the coupler butt and the back end of the pocket of this construction is 27 inches. That is the two groups of springs and followers and then this spacing block in the center takes up the full 27 inches. When those are put in usually we have to jack them into position. We put this coupler onto a screw jack and then we jack this right up into position. Sometimes they are very tight. When we put those together usually we have to take a coupler down and put those springs in there with quite a lot of compression so that it is sometimes hard to get them in. Then when you put them up into position they are supposed to be up there so they will fit moderately tight so as to overcome the slack on the pulling and the buffing strains.

Q. These follower plates with the springs on each side, that is when you get the strain both going and coming?

A. Yes, sir.

Q. Now, this coupler pocket, 27 inches in length, how far will your

[fol. 643] draw bar drop down if you haven't got any carrier iron on there at all with this construction?

A. With that construction when we took down the carrier iron that draw bar dropped down about three inches. I did not measure it, but it was about three inches that it dropped down at the front end of the draw bar.

Q. And was that as far as it dropped?

A. Yes, sir, it stayed right there.

Q. It has been testified here by Mr. Greenseth that the coupler socket was slightly bent downward, what does that mean?

A. From that report it seems as though that coupler pocket must have gotten an undue strain of some kind.

Q. In what way?

A. That would be hard to determine, because there are so many factors would enter into that. Unless a man saw the actual performance it would be hard for him to determine.

Q. He testified that it was not bent sufficiently so that he had to put in a new one at all; with it being slightly bent, as he says, to such an extent that it was not necessary to renew it, how far, in your judgment, would it permit the draw bar to drop?

A. That would be more of a problem for a draftsman to handle because you would have to get the angularity of that coupler shank to determine how far it could drop and off-hand I could not give [fol. 644] you that, but I would say unless the coupler pocket was bent so as to render it useless that the coupler could not drop very far.

Q. How much farther than the three inches that it would drop normally, as you found it, in your best judgment?

A. For a slightly bent pocket like that I would not say over an inch. But, of course, I want to be understood that I am not telling this as a positive fact because I don't know it, but my experience would be if the pocket were not bent so as to require renewal that it would not drop very far, and if the pocket were bent so as to require renewal, it would be hard to get that coupler back up into position. If the coupler were to be put in that position the outside face of the knuckle would not be true and you would probably have trouble in uncoupling the coupler. Because the face of the knuckle is supposed to be perpendicular to a plane running parallel with the shank of the coupler.

Q. When you say one inch more, you mean one inch in addition to the three inches that you found it dropping normally?

A. That is the limit that I would put it to, if I were making a guess at it. Of course, I could not tell unless I saw the actual circumstance. I couldn't tell how much that would be, but that would be to the best of my judgment, so long as the coupler pocket were fit for use, that it probably would not allow the coupler to drop more than an additional inch, because if it should be in condition that it would allow it to drop more than that, you would have trouble [fol. 645] to get the coupler back into position, and you would have no way to bend that coupler pocket so as to get the car back into

condition without either taking it out and putting it through the blacksmith shop or applying a new pocket.

Q. Did you take the weight of this draw bar?

A. Yes, sir, we had the draw bar weighed.

Q. Have you got the figures?

A. Yes, sir. This was a Simplex coupler five by seven shank, with four follower plates, inch and a half—eight by nine, two double coil draft springs eight by eight with five inch malleable spacing block, coupler and pocket with spacing block weighed 458 pounds and with the both springs and followers it weighed 681 pounds.

Q. We will say your coupler dropped four inches, of which you speak, from your experience and knowledge of cars, about what weight would a man have to lift to raise the draw bar up from the outer edge?

A. I took hold of this same coupler that is in this car now, under the conditions that we had it, and I had to lift a pretty good tug to lift it with my hands and the strength of my arms and from the way I lifted, I should judge probably that I lifted probably more than 200 and probably 250 pounds, but of course that was only an estimate because I have no means of weighing the weight that I lifted, but I can judge pretty close as to what things are when I lift them because I have been used all my life to lifting things and to weighing things.

Q. Did you try to raise it with your knee?

[fol. 646] A. I could not do it.

Q. Well, did you try it?

A. My knee wasn't long enough.

Q. Did you try it?

A. I did.

Q. How did you try it, show the jury?

A. Why, I put my knee under the coupler when it was in the down position after we removed the angle iron and I could not get any toe hold because my foot was about a foot from the ground. That is, from the top of the snow and I should judge from the looks of the snow between the rails that there is probably about two inches of snow and ice between the tracks at the place where we made this measurement, and I think it was Mr. Greenseth who dropped a rule below my foot when I had my knee under this coupler and he measured twelve inches from my foot to the ice.

Q. Did you try raising up on your toe?

A. I could not reach it by standing on my toe. There was practically the same distance between my knee and the coupler that there was between my foot and the ground when I held my knee up against the coupler.

Q. Did you try with your foot entirely off the ground to move the draw bar with your knee?

A. I gave a little wrench on it, but I couldn't do anything. I had no strength there.

Q. Could you budge it at all?

A. No, I could not budge it.

Q. How tall a man are you?

A. Five feet, seven, I think.

[fol. 647] Q. What do you weigh?

A. I weigh about 180.

Q. You are a man that has been used to heavy work?

A. I have always been an active man. I keep myself in pretty good condition by working around my place at home in the summer time and do what work I can around at week ends. And when I don't have anything else to do I love to walk. I love to keep myself in physical condition.

Q. Your physical strength, then, is good, it is up to par?

A. Yes, my physical strength is about par with most men of my age.

Q. From the experiments that you made and your knowledge of cars, with the horizontal bolts all gone and just two vertical ones, one at each end, and we will say one of them is seven inches long with one or two slip nuts on on the left hand side, and the burr off on the right hand side, is it possible for that carrier iron to swing around under the car?

A. With a slip nut on?

Q. Yes?

A. No, sir.

Q. And with the slip nut off and down below those support plates, the carrier iron, is it possible for it to engage anything or to catch on anything?

A. You mean after the carrier iron has been brought down below the lower edge of the support, is it possible for anything to catch it? [fol. 648] Q. Yes?

A. No, sir. When we had the three quarter nut on with practically a full thread and swung that around there was nothing to engage it at all, but I would have you to understand that when we did that that dropped that carrier iron down so that it rested on the three quarter nut that was on the left hand bolt, so as to bring it down below his carrier iron support which projected, say, half an inch below the edge of the angle of the carrier iron when it was up in position.

Q. You mean below the angle of it or the bottom?

A. The bottom edge of the perpendicular side of the angle iron.

Q. So long as that left hand corner was up at all on that plate on the left hand side, would the carrier iron swing at all under the car?

A. Not as long as it engaged that spot. We had to let it down so that the carrier iron swung clear of that spot before it would turn under the car.

Q. On both sides?

A. Yes, sir. I am speaking of the left side where the bolt is. We had to let the bolt down so it would swing clear of that spot because we tried it in several positions and until we got it down so it would clear that spot it would always strike that spot and stop.

Q. Of course, the right hand side was down, anyhow?

A. The right hand side was down, yes.

[fol. 649] Q. Something has been said here, Mr. Zachritz, about these couplers striking against each other; Mr. Greenseth's testimony

is that a coupler seems to have struck against the next car to it; what effect would that have on the coupler?

A. What you are trying now is to say that one coupler passed immediately above the other, is that the idea?

Q. That seems to be it?

A. In that case we probably would have a bent end sill, and in that case we would probably have a broken draw bar pocket and in that case we would have a broken uncoupling device, because if one coupler rode the other and drove back against the end sill of the next car it would sheer off the uncoupling device.

Q. We will say it is your theory, Mr. Anderson, as I understood it here, that the good coupler came up on top of this bad coupler.

Mr. Anderson: I am just interpreting what your witness said, that is all. I am not testifying.

Mr. Palmer: The witness said, showing the car had been run with the coupler hanging down and had struck against the next car.

Q. Assuming this coupler was hanging down and the coupler on the other car came up on top of it, what then would happen?

A. If you did that you would bend your coupler pocket so that it would not be fit for further use without repairs and would probably bend the end sills and you would most assuredly sheer off the uncoupling arrangement.

[fol. 650] Q. In that case would there be anything that would strike against this carrier iron underneath?

A. Not unless the coupler were driven down so far that it would engage it, which would mean that you would bend your coupler pocket quite a few degrees below parallel.

Q. And in that case would your draw bar strike the carrier iron?

A. That would depend on how far down the carrier iron was, but I should say no.

Q. Would it have any tendency to bend it around under the car?

A. If that carrier iron were absolutely free and it got jar enough to swing it, it would probably swing under the car a little bit, but I don't think that the coupler coming down on there would have a tendency to swing it under the car because I believe it would snap that bolt off. If it got that much pressure put on it I think it would break that three quarter inch bolt, particularly with that carrier iron hanging down practically on the very end of the bolt. That long leverage there bearing down on it, I think it would snap the bolt off. I don't think it would have a tendency to shove the carrier iron out of the way.

Cross-examination.

By Mr. Anderson:

Q. Calling your attention to Exhibit 13 and the end of the knuckle, how long is that knuckle up and down?

A. They are about nine inches.

Q. Now, when two cars are coupled together, there is another

[fol. 651] knuckle on the A end of this car coming up here, isn't there?

A. Yes, sir, engages in this manner.

Q. How far must the B end knuckle coupler drop down to disconnect those two?

A. It is nine inches.

Q. You heard the testimony that this train broke in two?

A. Yes, sir.

Q. What other way could the knuckles separate if they were in first class condition and did not open and did not break, excepting by one coupler dropping down nine inches and letting the knuckle out?

A. I don't know of any.

Q. If they separated in that way this defective coupler dropped down nine inches, didn't it?

A. If both cars were the same height.

Q. They are supposed to be substantially the same height as to couplers?

A. The United States Safety Appliance Law allows us a variation of three inches.

Q. If there should have been the extreme maximum variation in these two couplers, it would have to drop down six inches, wouldn't it?

A. Yes.

Q. Well, if it dropped down six inches the carrier iron underneath would have to go down in the center six inches, wouldn't it?

A. Yes, unless it breaks off or unless it is clear around.

[fol. 652] Q. It has got to give way there substantially a six inch drop of the shank of the draw bar here to allow the head of the draw bar to be uncoupled, isn't that true?

A. Yes.

Q. If the center of this twenty inch carrier iron goes down six inches, the other end out here will have to go down more because it is on a slope, that is right, isn't it?

A. I presume that is so.

Q. If that carrier iron went down far enough to let a nine inch knuckle come out from the other nine inch knuckle, are you prepared to say what might have happened and become of that carrier iron under those conditions, with the train working?

A. Depends very largely upon conditions. Now, if that carrier iron were hanging by one bolt that carrier iron was probably turned around so that the coupler did not strike it.

Q. Turned around where?

A. If it was low enough so that it would clear those supports.

Q. Underneath the end?

A. It would probably be away from there.

Q. Which way?

A. Well, it might turn one way and might turn the other. I don't know.

Q. Might turn back?

A. Might turn back or it might turn forward, I don't know; I wasn't there.

Q. Well, I know you were not.

[fol. 653] A. This is only a hypothetical case, you know, Mr. Anderson.

A. Yes, I know it.

A. Anything that I might say in connection with that now is only conjectural.

Q. Surely.

A. Because I don't know anything about it.

Q. It is rather conjectural also as to what would happen, basing your testimony on your tests down at Shoreham?

A. No, we got actual facts there as to what would happen under those conditions.

Q. But you don't imagine, do you, that the conditions that existed down there at Shoreham were parallel with the conditions that existed down at Gordon when this train broke in two and when they were trying to couple it up?

A. Not having been at Gordon and seen conditions there, I can't say.

Q. When this train was running up from Ladysmith there and stopped two or three times and started again with seventy cars, eleven loads and fifty-nine empties, there was a good deal of strain put upon this broken appliance, wasn't there, necessarily?

A. I presume so, yes.

Q. And when it finally did go down far enough to let the knuckles part, there must have been a good deal of strain around that region, don't you think so?

A. Yes, if it went down far enough to let those knuckles get by in that way, there must have been considerable strain on that coupler [fol 654] and the coupler pocket, but not necessarily on the carrier iron.

Q. But the carrier iron had to get out of the way some way didn't it?

A. Yes, sir, either that or get broken off.

Q. There is no testimony that it was broken off here?

A. No.

Q. But there is testimony here that the only bolt that held the carrier iron was seven inches long?

A. Yes, sir.

Q. And one of the witnesses for the defendant who inspected the car some two days afterwards says that that long, seven inch bolt, was badly bent; you would expect it, wouldn't you?

A. Might.

Q. You would rather expect it would be broken off?

A. If you got that draw bar down there with that carrier iron immediately under the draw bar, you would certainly break that three quarter of an inch bolt off.

Q. The testimony in this case shows there were two bolt holes through that carrier iron at each end, you remember? Of course, you found the horizontal bolts all in when you saw it?

A. Yes.

Q. Those four bolts were all gone, the undisputed evidence shows that, at the time of this accident?

A. Yes.

Q. So we have no support so far as those four bolts are concerned in this carrier iron?

[fol. 655] A. Yes.

Q. The testimony shows there were two bolt holes in the left end of the carrier iron of the B end of the car, you understand that?

A. Yes, sir.

Q. And my recollection is that your map here shows that those two bolts up here were on a line substantially, is that right?

A. Yes, sir.

Q. Lengthwise of the carrier iron, is that right?

A. Yes, sir.

Q. One of them, of course, went through this support near the inner edge, didn't it?

A. Now you are talking about the horizontal?

Q. Yes, those bolts that hold it?

A. Yes.

Q. One bolt would go through out here towards the draw bar, the other bolt through here towards the other side, is that right?

A. Yes.

Q. I am going to leave the one in that is closest to the draw bar.

A. I think that it was the outer bolts that were in question.

Q. That were left? I haven't heard any witness say so yet.

Mr. Palmer: The outer bolts. Yes, that is what Mr. Greenseth said. Let's see if it is. He wrote it other end on the typewriter, but it is outer end.

Mr. Anderson: Did he read that or did you?

Mr. Palmer: I mean in his book he said it was outer and the typewriter said other.

[fol. 656] Mr. Anderson:

Q. He says these two bolts were the only bolts holding up coupler on the outer end or front end, what does he mean by that, this car foreman, do you know?

A. The front end of the coupler extends beyond the carrier iron to the outside.

Q. I don't care; leave either one of these bolts in you want; now, they are all out of the right hand end?

A. Yes.

Q. Down goes you coupler and down goes your right hand end of your carrier iron until it passes below this five inch obstruction; it would have to pass below that to let the coupler go down, wouldn't it, six inches?

A. Yes, sir.

Q. Now, then, by the operation of the train with this tremendous strain and pushing against that draw bar, this one that is down, where will it force that carrier iron when you are backing up, for instance?

A. I don't know that it will force the carrier iron at all. If the carrier iron dropped off the bolt and the opposite nut were run down so as to allow that carrier iron to swing clear of the stop,—

Q. You mean over on the left hand side, now, too?

A. Yes, that carrier iron might turn around out of the way. It might not be forced at all.

Q. You are giving an illustration where you let the left hand nut [fol. 657] clear down below the obstruction or stop?

A. Yes, that end comes down. So that when the carrier iron dropped it dropped clear of that stop, it might turn around. It might not be required to force it.

Q. And if it didn't go down so as to clear the stop on the left hand side and the conditions were as I have described and the power applied, what would become of the carrier iron, in your judgment?

A. I think it might have a tendency to break that three quarter inch bolt.

Q. Yes, or bend it badly?

A. Yes, if it didn't break and it swung around before it did break it might bend it pretty badly.

Q. Here is this seven inch bolt through this end of the carrier iron here so it drops down two or three inches or an inch or anyway so the stop is behind it here (indicating)?

A. Yes.

Q. This is the top and this outer end goes down so that this one remains stationary; now, that thing swings around there, this bolt remains stationery, doesn't it, and after it goes a little ways it will begin to press against the inner edge of the stop, won't it?

A. We didn't find it so while we were making the test.

Q. Well, if you pressed back when you made the test you would press it against the inner edge of this stop over here (indicating)?

A. The carrier iron?

[fol. 658] Q. Yes.

A. Yes, sir.

Q. And it would be prying against the inner edge of that and be prying out on the bolt, wouldn't it?

A. Yes, to a certain degree, but not very appreciably. The weight of that carrier iron in itself would not exert much force on that bolt.

Q. No, but when you come against it with your well developed muscular strength and push against it, it would strike the stop on the inner edge?

A. No, on the outer edge, speaking of the outside of the car.

Q. Yes, and on the side towards the draw bar, of course?

A. Yes. I would not say on the side towards the draw bar because it would depend on the angularity of your carrier iron. It might strike that even the center of that stop if your carrier iron hung down at a certain angle. It might clear a part of the stop, but strike the stop in the center. The last place it would clear would be on the side away from the coupler.

Q. I don't want it to clear it in this question. Let's use this as the stop over on the left side (indicating); now, this part we are talking about that faces against it about like my hand, doesn't it, as it runs across to the next one (counsel indicating)?

A. Yes, sir.

Q. If you take that carrier iron and carry it around as I am [fol. 659] carrying my hand, the bolt is holding it over here, isn't it, somewhere (indicating)?

A. Yes, sir.

Q. As you carry it around it will press against that, won't it, push on it?

A. It has got to push it.

Q. And it will pry on the bolt over here, won't it? As it goes over that will pry out, won't it?

A. When it meets with that obstruction then it acts as a lever to press against the bolt and the more force you exert against that, the more force you get against the bolt, of course.

Q. I don't know whether you would be strong enough, but if you get force enough you would bend that bolt? It would bend, wouldn't it?

A. It might.

Q. And if you keep on shoving around until it bends badly, where will be the loose end of your carrier iron? Be under the car, won't it?

A. Understand me that just as soon as you get any part of that carrier iron under the end sill, then you have got that part of the carrier iron under the car, but that doesn't say that the carrier iron is under the car. It simply says just turned a little.

Q. It is like a boy crawling, when he starts to crawl under, under a car he isn't under, but he goes under and he keeps on going until he stops.

A. I don't want you to misunderstand me to say that the carrier iron is under the car when it isn't under the car. That is all. I want to be straight.

Q. I know, but when you are making this test, you understand, [fol. 660] I want you to push it as though you were pushing it under the car, you understand, the right end?

A. I understand that is what you did.

Q. If you do so and if you push hard enough you will bend that bolt or you will break it, won't you?

A. Yes, you would, but in making this test by hand you know, you do not exert that amount of force in it.

Q. In other words, you do not exert a hundredth or a thousandth part of the force that would be exerted if cars were smashing around and coupling and uncoupling and backing up on you?

A. No, sir, we don't claim that.

Redirect examination.

By Mr. Palmer:

Q. If the coupler should ride up on top of this defective car coupler, hanging down, is there anything on that other car that could touch that carrier iron at all?

A. No, sir.

Q. Or exert any force on it?

A. No, sir.

Q. Or engage it in any manner?

A. No, sir.

Recross-examination.

By Mr. Anderson:

Q. You say there would not be a thing touching the carrier iron under the conditions counsel stated?

[fol. 661] A. Yes, sir.

Q. That carrier iron is loose at the right end?

A. Yes, sir.

Q. The draw bar is down, how long it had been down three inches, four inches, five inches, and still holding nobody knows, but finally the draw bar keeps going on down until the knuckles clear; what is it doing to that carrier iron all the time? Isn't it pressing it down?

A. The carrier iron may not be there. When we had that test, when we dropped that carrier iron down so that there was just practically a full nut on that three-quarter bolt, the carrier iron swung back out of the way. I could swing it right back very easily without any exertion whatever, just as long as we cleared that lug.

Q. But down here at the scene of this accident the carrier iron was loose at one end when discovered and the draw bar was down so that the nine inch knuckle was uncoupled and you only dropped the draw bar down three inches when you say it was not against the carrier iron; take that draw bar and force it down nine inches, would it have been against the carrier iron?

A. I don't know whether it was or not. The carrier iron may have swung around out of the way.

Redirect examination.

By Mr. Palmer:

Q. Mr. Zachritz, we will say that the coupler on this defective car dropped down so that it does come loose from the corresponding coupler on the other car, do you wish to be understood as saying that [fol. 662] this coupler has got to drop down nine inches in order to uncouple?

A. Yes, it must drop down nine inches if there is a nine inch contact there because you have got to drop down until the contact is clear. The only way that you would not have a full nine inches

would be if the one coupler were lower than the other. Now, if one coupler was thirty-four and a half inches, which is the maximum height of a coupler, according to the United States law, and the other were thirty-one and a half, which is the minimum height as per the United States law, in that way you would have that variation of three inches and then you might get a slight further variation if the train was in motion at the time of the break in two and if the train was in motion at the time of the break in two and if one car went over a hump and the other down into a depression, then you may gain some that way. We are required to measure the height of couplers and we find that in measuring in different parts of the yard we get different measurements out of them and sometimes we get as much as an inch and a half or two inches variation just from the condition of the track, you know.

Q. Yes.

A. We do that in connection with the inspector for the Interstate Commerce Commission and we get variations in that way. Now, that is the only way that I could explain where you would not have to have the entire nine inches there.

A. I could not reach it by standing on my toe.

[fol. 663] ERNEST J. ROBERTSON, on behalf of defendant, duly sworn, testified as follows:

Direct examination.

By Mr. Palmer:

Q. Where do you live?

A. Minneapolis.

Q. How long have you lived there?

A. Since 1893, with the exception of a short time in '94 and '95.

Q. How old are you?

A. Fifty-one.

Q. Business?

A. Superintendent of the car department, Soo Line.

Q. Whereabouts?

A. Minneapolis.

Q. The Shoreham yards?

A. Shoreham shops, headquarters.

Q. How long have you been superintendent of the car department?

A. About thirteen years.

Q. Before that?

A. General foreman part of the time and foreman, inspecting, repairing.

Q. Mr. Robertson, have you had some occasion to examine this car known as Lehigh Valley car No. 82182?

A. Yes, sir.

Q. When did you first see it?

A. A week ago today.

Q. Where?

[fol. 664] A. Shoreham shops, Minneapolis.

Q. You made an examination of it, did you?

A. Yes, sir.

Q. I show you this picture No. 10, is that a photograph of the car as you saw it there?

A. Yes, sir.

Q. And this No. 14?

A. Yes, that looks like the same one.

Q. And which side is that?

A. This is the right hand side facing the brake end, B end.

Q. And this No. 15?

A. That shows the left hand side of the B end of the same car.

Q. And No. 11?

A. That shows the left hand side of the A end.

Q. Did you observe the character of the carrier iron on this car?

A. Yes, sir.

Q. And what is it that you call it?

A. Angle iron shape, structural steel.

Q. Did you make some experiments with it?

A. Yes, sir.

Q. Tell us just what you did?

A. We removed the horizontal and vertical bolts from the right hand side and removed all the bolts on the other side except one vertical bolt; we removed them all, as a matter of fact, and put in a longer bolt on the left hand side, put in a seven inch bolt, allowed the draw bar to drop down, put a three quarter nut on the end, screwed it up full thread and tried swinging the carrier around [fol. 665] Found it would not swing, of course, on account of striking the carrier iron supports on the left hand side.

Q. You had a seven inch bolt, you say, on the left hand side?

A. Seven inch bolt.

Q. With just one nut on it?

A. Three quarter nut.

Q. And did you try swinging it around under the car?

A. Yes, sir.

Q. You say you could not swing it?

A. Pardon me, there was a slip nut besides the three-quarter nut. Then it would not swing around. By removing the slip nut and having the full thread of the three quarter nut it could be swung around.

Q. While you had the slip nut on where was that end of the carrier iron with respect to this plate or carrier iron support?

A. It was partly in front of the support.

Q. How far up on the support?

A. I didn't measure. I imagine about an inch and a half, two inches, something like that.

Q. And so long as that carrier iron on the left hand side was up so that it touched that support, would the carrier iron swing under the car?

A. No, sir.

Q. After you took the slip nut off, and just had on the single nut, tell us what occurred?

A. Then it could be pushed around so as to clear the support.

Q. Did it then clear the supports on both sides?

[fol. 666] A. Yes, sir.

Q. Then how did it swing?

A. Just very easily. All you have got to do is to push it or pull it with one finger.

Q. Was there anything that it touched or engaged in any way?

A. Not a thing.

Q. Where was the draw bar at the time?

A. The draw bar was down about three inches, three and a half, something like that.

Q. When you had the carrier iron away down?

A. Yes, sir.

Q. Did it go down any further than that?

A. The draw bar?

Q. Yes.

A. No, sir.

Q. Tell us from your long experience with cars, suppose that the coupler pocket had been bent slightly downward, but not enough so that a new one had to be used, in your best judgment and opinion, how far would the draw bar drop down?

A. Very slight; possibly an inch; I don't think any more, half an inch, three quarters of an inch.

Q. More than the three inches you have mentioned?

A. Yes, sir.

Q. You weighed this draw bar?

A. Yes, sir.

Q. Something has been said about this coupler on this car being down and the coupler on the next car striking it, what effect would that have on the carrier iron?

[fol. 667] A. If it could happen, of course, the lower coupler naturally would go down and the higher coupler would go up. The coupler on the next car might raise up two inches or more and slip over and the other one without pressing the other one down very much.

Q. It would?

A. Oh, yes.

Q. What effect would that have on the carrier iron?

A. If it was on the carrier it would not affect it very much.

Q. Would it have a tendency to press it around under the car?

A. No, it would press it down more than anything else if it was resting on the carrier.

Q. Would there be anything on the other car which could strike against or engage this carrier iron on the crippled car?

A. Not unless there was something wrong; not if the car was in good condition.

(No cross examination—witness excused.)

HENRY GREENSETH, re-called on behalf of defendant, testified as follows:

Direct examination.

By Mr. Palmer:

Q. Mr. Greenseth, you say here, "found lower coupler pocket bent downward, showing car had been run with coupler hanging down and striking against next car." what did you mean by that?

[fol. 668] A. I meant that in switching previous to that or sometime back that had been struck that way. It didn't show that had been done recently.

Q. Could you tell from its appearance whether it had been done recently or not?

A. All them sill defects and pocket defects showed old.

Q. And this bending down of the coupler pocket, you spoke I think yesterday, about perhaps the couplers had rode up on each other

A. Yes, sir.

Q. One coupler had rode upon the other?

A. Yes, sir.

Q. To what extent would that be necessary in order to bend it as you found it?

A. I don't know as to that. I couldn't say.

Q. If it was a coupler on a good car that rode up on this one, is there anything on the other car that could strike against the carrier iron on this car?

A. I don't know of anything, no.

(No cross-examination—witness excused.)

Mr. Palmer: I am not certain, your Honor, as to whether all our exhibits have been offered or received in evidence.

Mr. Anderson: You may make an entry there that if any have been omitted they may be received in evidence.

Mr. Palmer: There has been no objection, I think, on both sides, so we can consider that the exhibits offered have all been received.

Mr. Palmer: We had thought of calling Dr. Gilmore, your Honor, [fol. 669] but he is very busy and I think the medical testimony has been sufficiently threshed over and we will forego that and at this time the defendant will rest.

Mr. Anderson: No rebuttal.

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#### PLIFF'S MOTION FOR A DIRECTED VERDICT

Mr. Palmer: If your Honor please, now, at the close of all the testimony, the defendant moves the court to direct the jury to return a verdict in favor of the defendant, upon each and all of the grounds following:

First. That upon all the evidence and the law applicable thereto plaintiff is not entitled to recover.

Second. That the evidence wholly fails to establish any negligence or ground of liability on the part of the defendant which is, or could be, the proximate cause, or any part of the proximate cause, of plaintiff's injury.

Third. That the claimed breach of legal duty on the part of defendant with respect to the carrier iron referred to in the testimony is shown by the evidence not to have been the proximate cause of the plaintiff's injury.

Fourth. That the Federal Employers' Liability Act and the Federal Safety Appliance Act are not, nor is either or any part of said acts, applicable to this case.

Fifth. That the Federal Employers' Liability Act and the Federal Safety Appliance Act are not applicable to this case, for the reason that it is not shown that the carrier iron in question formed any [fol. 670] part of the automatic coupler required by the Federal Statute, nor was plaintiff at the time of his fall and injury in a position to be within the protection of said acts, nor was the alleged violation of the Federal Appliance Act, under the circumstances disclosed, a proximate cause, or any part of the proximate cause of the plaintiff's injury.

Sixth. That the evidence conclusively shows that the sole proximate and moving cause of plaintiff's injury was losing his balance and falling from the bridge and that his fall and resulting injury were either accidental or arose solely from his own negligence and want of due care and that his injuries did not result, directly or proximately, from the alleged defect in the carrier iron or in any part of the coupling apparatus.

Seventh. That the evidence conclusively shows that the plaintiff assumed all risks incident to doing his work upon the bridge in the manner he did and that his fall and resulting injury arose solely from the risk so assumed.

Eighth. That the evidence adduced in behalf of the plaintiff, taken in connection with all the other evidence in the case, is not of sufficient weight and cogency to warrant a finding by the jury in favor of the plaintiff, nor is it sufficient to warrant a finding by the jury that the accident occurred in the manner and from the cause detailed and described by the plaintiff.

Ninth. That the evidence adduced by the plaintiff, taken in connection with all of the evidence in the case, is not sufficient to constitute a preponderance of evidence in favor of a finding in his favor upon the issues of the case, nor that the accident occurred in the manner described by him and from the cause described by him.

Tenth. That the evidence of the plaintiff is so vague and unsatisfactory that it is not sufficient, in the face of the other evidence in the case, to support a verdict for the plaintiff.

Eleventh. That the great preponderance of the evidence in the case shows that the accident could not have occurred in the way and manner described by the plaintiff and that the plaintiff has not a sufficient and fair preponderance of the evidence in an attempt to make out his case.

The Court: Motion denied.

(To which ruling defendant excepted.)

#### ARGUMENT OF COUNSEL

Argument to the jury by Mr. Anderson:

Mr. Anderson:

\* \* \* \* \*

Now, gentlemen, you can see there are a good many things to discuss and you notice I am sticking right to my text. \* \* \* I am not going to quote any law to you unless it is real law. I think I know it. I have been at it now for much over thirty years and I presume I have tried as many cases before a jury as any man of my age in the state of Minnesota today. I know what I am talking about and I have nothing but the highest esteem and warm respect for a jury. I am one of these men who have always stood put upon the [fol. 672] proposition that when it came to the decision of a question of fact a jury of twelve men, selected from the community, can arrive at the truth much more accurately and far better than the most learned judge who ever sat upon the bench, because you have got the combined judgment of twelve brains working together and you can rub up against each other and you can discuss the facts back and forth when you come from various walks of life and that is the reason we have a jury system in the Anglo-Saxon race. It is the bulwark of the liberty of the Anglo-Saxon race, wrung from the old barons in England hundreds of years ago when John was pretending to be the king and when old Richard the Lion Hearted was off in Philistine and came back and scared the wits out of John when he found Richard was alive. So much for that.

Now, naturally being rather inclined to be courteous, I want to thank the Soo Railway Company most heartily, through my dear friend John Palmer, and I hope that he will convey the same to the president, etc. for bringing in the trial the facts which were not brought in on the former trial. Funny that he brought them in. I am referring to their car foreman, the gentleman—I don't remember names very well, but I do remember every atom and scrap of testimony in the case, and, by the way, you will notice I don't take any notes; I don't labor so hard as that. Mr. Palmer is more industrious. [fol. 673] He takes notes, but I don't. I am too lazy; I don't like to

work so hard. But I don't remember names. You know the car foreman went upon the stand in this trial—he wasn't in the former trial—and laid the foundation for all the testimony after that, including the gentleman from away down in Pennsylvania, and including the hauling of the car from Pennsylvania to down here on the house track by the freight depot and your going down to see it. Oh, my! Oh, my! they thought, "Now, we have given Anderson a blow in the solar plexus. Watch him groan. Watch him groan." Gentlemen, I want to thank the Soo Railway Company because by bringing that car here and putting on the testimony of the car foreman, the defendant company has furnished the plaintiff in this case a piece of evidence which God knows I wanted all the time, but I didn't know it existed, and that was this, namely, that this Lehigh Valley car that they sent out from that great division point, Ladysmith, that day and put in the train for these men to haul, was practically ready for the scrap heap, out of order, in a dangerous condition, likely to cause damage to men and property, a condition of a car that could have been discovered by the slightest inspection down there at that division point. I didn't have that before. All I had was what Ernie Goneau could tell us as he saw it there in the pitch-dark night, in the midst of that storm, on the bridge. That is all I could get and all that was "the carrier iron was down and the draw [fol. 674] bar was down and the coupler had become uncoupled and I went up there in the storm and the dark in the performance of my duties, working there on that bridge trying to remedy and overcome the condition created there through the negligence of the railroad company." Now what do we have? We now have a piece of testimony here that at the time this car, Lehigh Valley car 82182 was picked up there at Ladysmith—I suppose it was picked up there; maybe they brought it from Chicago. This train came from Chicago, part of it, but you remember the conductor said they had nineteen cars there at Ladysmith to be put in the train that was coming up from the south or east. I am not sure whether he testified that was one of the cars picked up there or not but I don't care. This division point—you know what I mean by that, division point, inspection crews, car repair crews, blacksmith and repair shops. When the car came in there it was their duty to inspect it and fix it, irrespective of the Safety Appliance Act I will refer to. It was a duty they owed this crew, including Ernie Goneau. It was a duty they owed to the public, it was a duty they owed to the passenger trains, because, oh, God, how many accidents have happened because cars separate and trains stop in the dark and passenger trains come up and, not knowing it, slam into them and life is lost. It was their duty. Did they do it? Here we have an angle iron carrier iron, I think that is the way the Pennsylvania gentleman designated it. That carrier iron was on that Lehigh Valley [fol. 675] car when it left Ladysmith. How many bolts in it? Eight originally, two horizontal over at one end, two horizontal at the other end, two vertical bolts in each end, making eight. How many were in it when this defendant company sent that car out in this train on that trip? Two. Two. How long was the one on

the left end? How long should it be? Four inches. Why, their own expert car man says as to one of the bolts, and that is the other one, it was four and a half inches; both too long; seven inch bolt in the other end, where a four inch bolt was the standard and proper length. One bolt on the right end, draw bar weighing hundreds of pounds, tremendous stretching and surging upon the carrier iron as the train proceeds and as it stops and as it backs and as they back up and run the slack in and then pull it out. You have all heard it do it many times, crack, crack, crack, the cars, some of them, weighing eighty tons; you know, this very car had a capacity of how much? 80,000 pounds, forty ton; therefore the car weighs forty tons, one-half its capacity, making 20,000 pounds in one end alone of the car upon which this coupler was. Is it any wonder that that train parted. Guilty of the grossest negligence at common law, the company was. No question about it. I am going to say to you twelve men that we will except it as the fact that the Lehigh Valley car that was there that night when the accident happened is the car you gentlemen looked at yesterday morning. I do not know it, but we will accept it as true. We will accept it as true that the coupling iron and all of its parts, including [fol. 676] the carrier iron, on the night of this accident were the coupler and parts, carrier iron, that you saw on the car yesterday. Give them the benefit of the doubt and see where we land. See where we land. What do I care?

Ernie Goneau the brakeman on that train that contained that car. It was the thirtieth car from the caboose. Ernie Goneau was riding in the caboose where he belonged as they passed through Gordon and where he would have remained in perfect safety until they reached their destination, probably got out at Solon Springs where they were to meet No. 18, then back in the caboose again, having no work. This was a through train as distinguished from one of these peddlers, as counsel says they are sometimes called, way-freight, local freight. He was there compelled by virtue of not only the common law negligence, but the statutory negligence of the defendant to leave that car and go up there in the dark in the storm, on that open St. Croix river bridge, and overcome there if he could the condition created by the inexcusable negligence of the defendant. I couldn't say that at the last trial because we didn't know the facts. So I say they were guilty of inexcusable and gross negligence which created this situation. I will talk about legal rights later on, but now I will explain about the statutory rights. I mentioned it very briefly in my opening statement and I think you gentlemen can follow me better if I explain to you what the law required of this railroad company.

[fol. 677] The law that I refer to—not now speaking of the Employers' Liability Act, passed in April, 1908, and becoming a law shortly after that; I am not speaking of that general act; that is for the benefit of all railroad employes engaged in interstate commerce, as Ernie Goneau was; I am speaking about what is known as the Safety Appliance law. That first act was passed in 1893 and that is the act controlling us here as far as Safety Appliance laws are

concerned. Why was that law passed? It was passed for the reason, in substance, that before that too many railroad men were being killed and injured on account of the kind of appliances they had on for coupling cars. Inventive agencies had been at work and couplers were being invented and had been invented known as automatic couplers, and so they passed a law in 1893, going into effect at a later date so as to give the railroad companies time to comply with it, requiring companies to have upon their cars couplers that would couple and uncouple automatically, without the necessity of the brakeman or employe going between the cars for the purpose of making such coupling or uncoupling or for the purpose of repairing and fixing a defective coupler so it would couple when the repairing is done by other than car repair men. That is the purpose of the law. That law requires the railroad company to see to it at their peril that the coupler is always right; always right. As one great court put it, "The law is absolute, imperative and continuous." And when complaint was made about the severity of [fol. 678] the law one great justice said: "There is bound to be some hardship somewhere and Congress has seen fit to impose that hardship upon the railroad companies because they are in possession of the instrumentalities and of the means of repairing and keeping them in shape and it should be there, rather than upon the shoulders of the operatives who are working in storm and sunshine and day and night and in hurry." That is the reason the law was passed and the reason that Goneau is a cripple for life is that they did not pay any attention to that law, but violated it, violated it maliciously almost you might say, in sending out this kind of a car from Lady-smith.

Now, the Employers' Liability Act is the one that says that a railroad company shall be liable in damages, applying it specifically to Ernie Goneau, if Ernie Goneau is injured, either in whole or in part, by virtue of the negligence of the railroad company or any of its employes, provided he is injured while employed in interstate commerce and it is admitted that he was so injured while so employed. In whole or in part. The old common law was that if a man was guilty of any contributory negligence—you know what I mean, want of ordinary care and if want of ordinary care contributed even in any degree to his injury, then the wrong doer escaped absolutely. But in this law the law goes on and says if it appears that the railroad company was negligent and the injured man was also negligent, the fact that the injured man was also negligent will not defeat his cause of action any more. They regarded it as an unjust principle [fol. 679] of the common law and they wiped it out in favor of these men engaged in this dangerous occupation, but the jury shall reduce the damages in the proportion that the injured man's negligence bears to the entire negligence in the case. That is the general provision. Just, isn't it? Why should a man who is injured through the wrong doing of another be deprived of any right of recovery if he is guilty himself of slight negligence?

But there is another provision contained in the Employers' Liability Act applicable here. Before I mention that I want to tell

you another thing: At common law there was another defense that the railroad companies had and we often called these the railroad companies and other corporations' favorite twins, contributory negligence and assumption of risk. Under the common law the railroad companies nursed those babies and fed them upon the kind of food counsel spoke of yesterday as too good—

Mr. Palmer: Now, if your Honor please, I dislike to interrupt counsel, but I desire at this time to take exception to his discussion of this contributory negligence and assumption of risk and common law negligence and his statement to the jury that the company was guilty here of common law negligence for which it would be liable and I desire that the jury be instructed or cautioned that they have nothing to do with common law negligence, assumption of risk or contributory negligence in this case.

Mr. Anderson: That is the exception, is it?

[fol. 680] The Court: The reporter will note the exception.

Mr. Anderson: I will go right on.

Mr. Palmer: I dislike to interrupt you, Mr. Anderson, but I feel constrained to do so.

Mr. Anderson: I accept your statement for what it is worth, but I will go on. I was speaking about the railroads' twin babies and in order that counsel, for fear he hasn't got all the glue out of his mind, yet, will understand what I am driving at, I want to illustrate the further provision of the Employers' Liability Act and the reason why they wiped out these twin babies as defenses. Assumption of risk was a principle of the common law which said—I am putting it, you know, in terms different than these learned judges put it, because they don't make it quite so clear as we laymen do sometimes. I do not mean this judge. Assumption of risk means where a man is employed by someone and there is a defect in a tool or appliance or a dangerous place to work or anything of that sort and the employe knows of the dangerous conditions and notwithstanding keeps on working in connection with it without protest and promise to repair, then the common law said if that gentleman saw fit to go on working and not quitting, he therefore assumed the risk and he had no complaint if he did get hurt. Well, the Safety Appliance Act of 1893, passed at that time—that, you see, was thirty years ago—has a section in it, a provision, that an employe injured by virtue of the fact that it has not complied with the [fol 681] law shall not assume the risk, pulling the teeth of the railroad company and making it so they will have some incentive to obey the law.

We got down to 1908 and they pass the Employers' Liability Act and then in section 4, I think it is, of that act, they make a provision, after saying reduce the damages in proportion and so forth, they say, "however, if the failure on the part of the railroad company to obey the Safety Appliance Act—" that is not the language; that is what it means—"failure on the part of the railroad company to obey the Safety Appliance Act contributes to the injury, then the railroad company shall not even have the right to put in contributory

negligence to reduce damages." And then another section says that the railroad employe, under those circumstances, shall not even assume the risk of his employment, under those conditions. Why is the law made so stringent? It is made for the purpose of making the railroad companies obey and puts the penalty upon them of absolutely paying the men if they do not obey, provided always that the failure to obey the law contributes proximately, however little, to the accident and injuries; contributes proximately, however little,—one per cent out of the hundred, if you please, as an illustration. And it doesn't have to be an accident where they are coupling and uncoupling cars. In this case that is what we were doing and that is the reason we will go a little further. We were trying to overcome the gross negligence of the railroad company. We were trying [fol. 682] to overcome it there in the storm and the dark. That is what we were trying to do, through Ernie Goneau, and what he was trying to do when he was hurt.

What is the next point? What is the defense in this case? I am asking that advisedly. What is the defense in this case when you get right down to bed rock? Their defense in this case is simply as follows: "Yes, we admit that we took that Lehigh Valley car out of Ladysmith at least, the division point, with six bolts out of eight on a very, very important part of the coupler—" oh, no, they don't admit it is a part of the coupler; they want you to say whether the carrier iron is a part of the coupler. We will talk about that later, but leaving that out, they admit that they took that car out of there with six of the eight bolts out; they admit if the carrier iron comes down the coupler will go down and come uncoupled and that means it is no good; that is what it means. They admit by the very evidence that the defects that I am talking about could be seen at a glance there at Ladysmith. You saw what it was, right there at the end, when you gentlemen were inspecting the car. You had your inspection down there. You must not use it at all for original evidence. I often wonder how you are going to work it out, but that is the law; take it for what it is worth; but when you were inspecting the old car I presume you had your eyes open and I presume you got down under the car and saw the condition and you saw the plates underneath and the condition of the plates underneath and the condition of those bolts. I did, but never mind. They brought [fol. 683] that car all the way from Pennsylvania, I suppose. They admit all that; in other words, the coupler was not worth a continental in the condition it was in and they have told you, as a conclusion, that they did not make any effort to fix it; trusted to luck. They admit that the train became uncoupled on this bridge. They admit that Goneau in the performance of his duty there as a faithful railroad man, went up there in the storm and the dark that night to overcome the results that must necessarily follow such rank negligence on the part of the railroad company sometime, somewhere. They have to admit that. They have to admit Goneau was doing his duty like a splendid railroad man, as he was; not the kind of a man as Rocheleau who would work for two or three months and go off somewhere else and then bob up at some other railroad

and then bob up again and disappear and disappear, coming back for twelve years. No, Goneau worked for twelve years. He was thirty-one years of age when he got hurt. That is the kind of a man he is. And they admit that he got hurt while he was doing this work. But what is their defense? Why, their defense is: "Notwithstanding our negligence and the necessity of his going up there, Goneau got up there and he got those couplers together. He got them together and if the carrier iron was displaced he must have gotten it back in place." That is what they admit. And they say—this is the defense, I mean—then they say that he got the train backed up and he got the couplers together somehow and [fol. 684] somehow counsel says that the plaintiff said it made a good coupling, in summing up to you. Goneau said it made a sort of coupling or he hoped it would hold, but it didn't. But they say he made a coupling. They say that he coupled up his air hose and cut in the air. This is this man Rocheleau that they are depending upon. And then they say this experienced railroad man after he had done all this dangerous work, the coupling being completed and now not working with the coupling—see the point? You have got to be careful, gentlemen, or you can't find this eye of the needle. It is a fine point the defendant is relying upon. They are balancing on a fine wire and I take it by the way they act they have no balancing pole. They are liable to take a plunge if they are not careful. There is a technical ruling under the law sometime, somewhere, namely, if the man had completed fixing the coupling and got the coupling together and the air hose together and then in some way met with an accident, then the coupling defect is not a proximate cause of the accident. That is their defense. And so they say Goneau, after he had finished the coupling here, after he got it all fixed and coupled up he stepped out and he stepped off the bridge: the most accommodating gentleman I ever saw, for if he stepped off the bridge just under those particular circumstances the railroad company won't have to pay one penny and, oh, how they love that thought! How they love it! But they must have something to help them out. \* \* \* They know what Rocheleau has said to the [fol. 685] claim agent. And they have this paper in their hands. They have got to convince a jury that this man stepped off of there in order to have the thing stand up at all. Let me read that sentence to you again. Now, please understand this, this statement is taken as a statement of what we call general facts, as distinguished from detailed facts given when we are on the witness stand. In taking such statements—I am going to be fair to these people—when you take such a statement you do not go into every little detail the way you do in examining a witness in court. I am not going to read the statement. Mr. Palmer read it. In a general narrative he gives the consecutive steps about the break in two and the kind of stop and he immediately got out and went back and he received and transferred signals and after a while the train backed up and then he claims there was a slack ahead signal given—and by the way, I don't care a picayune whether there was a slack ahead signal given or not. Mr. Goneau may not remember. A slack

ahead signal possibly may have been given. It is immaterial. Then he goes on. This is statement taken by the railroad company itself, through its own employe Bratager, from its own employe Rocheleau; don't forget that. It is not a statement taken by someone for Goneau where there would be any incentive to get anything into the statement that was not true and which would be against the interests of the railroad company. Here is the sentence written in here and you remember I asked Rocheleau if Bratager asked him questions [fol. 686] and he answered and Bratager wrote the answers down and asked him another question and he says yes. "He was unconscious when I found him." Plain, is it? No chance for mistake. "Ernest Goneau was unconscious when I found him." Ernie Goneau says that he doesn't have any recollection of Rocheleau coming, down, but he does remember later on, and you will remember that was quite a while afterwards, "I do remember of asking for his mackinaw." "Do you remember anything, Ernie, that took place?" "I think I remember seeing a light up above and I do remember of a torch being down below." "Do you remember about being carried out?" And I think he said, "No." Rocheleau says, "He was unconscious when I found him and I did not hear him say how it happened at any time after the accident." Those are the words, and you know it, of this man Rocheleau who now comes into court as he came into court a year and a half ago and testified, "Yes, I asked Goneau—I went down—Ernie, how in the world did you get off the bridge and Goneau says, 'I stepped off.'" There is their defense. Ye gods, what do you think of it? What do you think of it? It is an insult to the intelligence of any jury to come into court under those conditions and undertake to claim any such defense. Now, of course, if Rocheleau did not say that this claim agent of the railroad company would have gone on the witness stand. He would have because of the truth that counsel says he is seeking so diligently and earnestly that he could hardly let go. I was afraid [fol. 687] he would talk all day again. This is the situation. That is the situation, but counsel of course, realizes that he is on slippery—oh, he isn't on ground at all; he is trying to walk on water when he is dealing with that situation. He is trying to get a toe-hold so he talks about the engineer, Barnaby. Gentlemen, I judge from the way counsel spoke I must have been awfully cruel with that poor little Barnaby; I guess I must have been. He is the man, you remember that when he started down to follow this long-legged conductor he got so far behind that the conductor called to him to go back and go to bed—or, I mean, "Go back and go on your engine, slow-poke." I guess is what he meant. Well, they got the conductor or was it Barnaby? Was it Barnaby—which one said he slipped, John?

Mr. Palmer: Barnaby said he slipped.

Mr. Anderson: Barnaby, by the way, is even so astute and so attentive as he is sitting up there and waiting for a signal to move, that he could even tell when they turned the angle cock back there. "How could you tell?" "Oh, I Could tell; I could tell. I could feel the brakes go on." He is the man who couldn't remember a durned

thing I asked him about that didn't happen to help the defendant company. That is Barnaby. Well, what does Barnaby say? He looked like an accommodating citizen when the accommodated party shall be the railroad that employs him. He says, "I went down there and asked Goneau how he got hurt, how he came to fall off the bridge, and Goneau says, 'I slipped off.'" Well, that gives counsel here a fit.

[fol. 688] Mr. Palmer: Slipped and fell

Mr. Anderson: Oh, yes, slipped and fell. Thank you. I forgot the other word. Slipped and fell. Now, what does Mr. Palmer say about that? Why, he argues along the line that he must have stepped out there to give a signal after he had the coupling and he slipped and fell. It was not in connection with pulling over the carrier iron and the carrier iron slipped. Oh, if it had been the carrier iron he would have said, "I was pulling on the carrier iron or had my knee here and slipped suddenly and I went off." This is the man you are talking about that your own witness says, taken on the 1st of November, was unconscious. This is the man that Rocheleau was with there more than anybody else. This is the man that Rocheleau was with when the engineer came down there, in a position to know whether he said it, and this is the man whom Rocheleau says was unconscious when I found him and he never made any statement after the accident as to how it happened. Gentlemen, I tell you when I was a boy I skated once on thin ice and I loved the sensation, but Mr. Palmer is skating on thin ice and I know he is scared and don't you believe his bluff when he says he knows you twelve men realize he has got a good defense. Pardon me if I take time because I am here representing that man who can't stand here and represent himself. I owe it as a duty to him as an officer of this court, as well as his attorney, not to leave a leaf unturned to assist you men to arrive at a just verdict and I am not going to stop until I feel [fol. 689] that I have performed my duty and I know you won't want me to. I will try not to bore you. I will try to keep you interested as much as possible. So much for that. There is the defense.

Counsel says it must appear in this case—let me get that; I don't want to quote this without being sure. Here is what counsel is talking about. "If you find—" these you know are the defendant's requests. I didn't have any. Let's see how many they have got there; got about half a dollar's worth of paper—twenty-three. Now, the court charges the jury; the court tells you what the law is, but the defendant, properly, within their rights, has put in twenty-three requests. Here is one of them, twelve: "If you find from the evidence that the plaintiff fell from the bridge when the train was coupled together and not in motion—" that means coupling complete, coupling in shape so the train would go on its journey, air hose coupled up, air cut in, everything ready for what we call the high-ball go ahead or the high-ball back up,—“then your verdict must be for the defendant.” Now, that instruction will be given you by the court. Well, that instruction means this,—nothing else—that instruction means if you find that Goneau had succeeded in making a coupling of that train, finished making it, ready to go, not for the

purpose of testing it if he stepped off, not at all to see whether it would work because that was part of the act of fixing the coupling up, testing it out, like the slack ahead is testing it out, as counsel told you, all finished ready to go.

[fol. 690] Mr. Palmer: Well, now, I except to that as an entirely erroneous statement of the principle of law embodied in the instruction.

The Court: Note the exception.

Mr. Anderson: And then it reads, "Plaintiff fell from the bridge—" I was wondering. That is one—well, here is one connected with it, thirteen: "If you find from the evidence that the injuries of which plaintiff complains were occasioned in another manner than by the slipping of the carrier iron when he was pulling upon the same your verdict must be for the defendant." That instruction will be given. Counsel, I notice, gives a little sign of satisfaction. I heard him. What does it mean? I am going to tell you. It means this, in substance, that the plaintiff in his complaint lays the foundation of his cause of action and in that complaint we have come out fair and square, after describing the conditions and situation, and have alleged that at the time this accident occurred Goneau was attempting to fix that coupling. Well, that is what we say here, get that infernal thing back and while he was pulling on that it slipped and threw him off the bridge. That is our allegation. We have no other allegation in the complaint. We haven't alleged that accident happened in some other way. We haven't alleged that he made that coupling and brought it together and stepped out on the side of the bridge for the purpose of having a slack back and testing it out. We haven't alleged that here because it is a lie. That is the reason we haven't alleged it. That is their defense in part. We did [fol. 691] not allege it because it is a lie and Rocheleau knows it is a lie when he tries to put it across. And you remember Rocheleau testified at this time that when he testified in September, 1921, he still had hopes of being a railroad employe, but he has no hopes now. Of course, he would testify this time the way he did before, wouldn't he, because with the record all printed out, it would be a bold man to come here and testify contrary to the way he testified before and give me a chance to cross examine him. That is the reason that instruction is being given. If we had alleged in this case and it had been the fact that he was pulling that defective draw bar over, but after fixing it, he was pulling the good one over so they would meet in line, as he testified he did, and his hand slipped off, he would have a cause of action. Of course, he would because he was trying to fix up a coupler so it would couple. If he had made the coupling and had stepped outside for the purpose of slacking back and testing it, it is all a part of an attempt to make the coupling.

Mr. Palmer: I take an exception to that.

Mr. Anderson: And we would have alleged it——

Mr. Palmer: Wait a moment. I take exception to that as an absolutely erroneous statement of the law and ask that the jury be instructed to wholly disregard it.

The Court: Note the exception, Mr. Reporter. I did not hear it

plainly enough to make any statement with reference to it. Go on.

Mr. Anderson: Now, we will pass on to another part of the case. [fol. 692] We will pass on to the testimony as it stands with reference to what Goneau was doing at the time this accident occurred. Of course, the only testimony we have is that of the plaintiff himself. Now, when you come to consider such testimony as that you not only consider the words uttered by the plaintiff himself, but you are to consider his personal appearance, demeanor, whether he has the appearance to you of attempting, at least, to tell the truth, whether candid or honest or otherwise cuts a great figure. On the other hand, I presume his Honor will charge you, it is usually said, that you are also to take into consideration in weighing evidence the interest the party has in the outcome of the case. The plaintiff has a great interest in this case, of course. You will also consider the probability of the way the accident happened, the probability of the story told by a witness, whoever he is, whether or not it is one that is worthy of being believed, whether it fits in with your common experience in life, as to whether men would remember this and would remember that, would see things this way or that way and so forth. So much for that. Goneau tells you—I am not going over the thing in detail—about the stopping of the train, that he took a hose and an S-wrench and went up alongside of his train, of course, looking between car after car for the purpose of ascertaining whether there was any trouble there and leaks of air, up until he reached the west end of the thirtieth car in the train or the twenty-ninth, I think it was, [fol. 693] for the defective car was the thirtieth, according to the testimony. When he got up there he found the trouble, found the train separated. Nobody contradicts, nobody undertakes to contradict it, nobody claims it is not correct so far as that is concerned. He found the draw bar down, found it uncoupled, knuckles were not broken, air hose not broken. The only thing that caused the coupler to fail to perform its functions was the condition the carrier iron was in. That is all. Nobody denied it. Therefore, in this case it is an admitted verity. There is the situation. He says he went in to find what the trouble was and when asked the question about the character of the carrier iron he said it was a piece like that one that the defendant has put in as an exhibit, to the best of his knowledge. That is the way he remembered it. Counsel on cross examination asked him if there was more than one hole in each end of the carrier iron. I think he said he thought not, but there was only one bolt—I remember him saying that—only one bolt, and it is admitted that there was only one bolt at that end; it is admitted that the nut was off; it is admitted that it was gone. And, by the way, counsel in his argument says, “I believe Goneau put a nut on that bolt,” and then when the train parts again after they backed up off the bridge he tries to have you believe the conductor says that that end was bolted up and the other end was off. Well, now, what does he want you to believe? That in going back there off the bridge that the other nut came off? I don’t know. I just mention it. I just mention it. [fol. 694] That is what he said he did and described the iron. I am not going into detail except as I comment upon the evidence. He

says that he got the carrier iron back in its right angle position to the draw bar. He testifies when he got it back the draw bar was not high enough to make a coupling; another time he says so as to make a coupling which would seem as if it would hold; and so he hunted around and he got shims and he put them under there and he worked like a faithful railroad man until he got the coupler up until he said it had a hold of I think about one half; you gentlemen can remember that better, but I think he said about one half, about four and a half inches and certainly no more than that, he hoped it would hold. Then he says that he coupled up—no, he closed the angle cock in the head end of the crippled car. You know that angle cock; you have seen it; that he closed that cock so that the engineer or, rather, so that the pump on the engine would pump the air up in and release the brakes which of course during all this time were set in emergency on the entire train, were set for all the time we are interested in here anyway, so he could release the brakes because he was going to back up and make the coupling. Then he goes up on top of the train. Now, incidentally, you understand, in the decision of this case it doesn't make a particle of difference where he gave the signals from, except in so far as that would bear upon the verity of his various statements as to his being thrown from that bridge when [fol. 695] he was working at the carrier iron. That is all. It doesn't make any difference where the signals were given from. Ernest Goneau tells you where he gave them from. He says he went up on top of the train, the east car; that ladder would be at that corner (indicating) of that car. "I took my hose and my wrench—" possibly he had two wrenches; I don't know where the big monkey wrench came from; it is kind of a mystery in this case, but no matter—"and I put them on the running board up there and I gave the back-up signal." Where was Rocheleau at that time? Rocheleau was up towards the head end, away up, that is his testimony, somewhere pretty near the head end. Does he know how far? "No, I couldn't tell how far." That sounds honest, there in the dark and the storm, doesn't it? "I don't undertake to say just how far." Where was he? Why he was up on top of train. Now listen: If he was down on the ground by the side of these cars that are twelve feet high and Goneau was up on the running board when he was giving the signal I don't think Rocheleau could see Goneau's signal. I doubt it very much because he would be looking down off from a twelve foot elevation and from over in the center of a nine foot car, with four feet to one side of you, and looking down and up along the train, assuming it is on a straight line and it was at that place, you couldn't see him. Goneau says, however, that this man was on top of the train and I asked him whether or not he could have seen him if he had not been on top of the train and he said no, he couldn't [fol. 696] see him. And Goneau gave the signal to back up and Rocheleau repeated it and the engineer in due time, after the air had pumped up and the brakes released, backed up that ten or twelve feet and the couplers came together says Goneau, says Rocheleau, says the engineer, in substance. Nobody denies that. We haven't got to the point yet where they are trying to get a toe-hold. Now, what does

the conductor say in connection with this? He says, "I went back with my fuses." One time in his testimony he says, "Oh, I was back there; couldn't see very much; I was back there six or eight or ten cars." Six cars, 240, eight cars, 320, ten cars, 400 feet; dark, you remember, raining and snowing, but there were lights upon the rear of his caboose, signal lights and he testified that he heard the noise and he could see the lights quiver. Of course, the caboose didn't move then; the brakes were set on the rear section in emergency, as everybody admits now; no chance to release the brakes; we hadn't connected up the air hose and cut in the air yet. So Goneau says they came together, he went down to examine the coupler and thought it would hold, hoped it would. "I coupled up the air hose; then I opened the angle cock on the crippled car so as to connect up the air through." The other angle cock was open, of course. What for? So the engineer could release the brakes. "What did you do then?" "Then I went back up on the car and I realized we were too close to eighteen's time and I was going to back into Gordon on a side track to let that train pass." "Did you see Rocheleau?" "Yes [fol. 697] he was up there in the same place. He repeated my signal and in the proper time the engineer backed up and we backed up about twenty feet or thereabouts—" of course, he doesn't know just how far,—"when the train stopped again, running at that time necessarily very slowly and it parted and separated four feet"—more than that—four feet between the draw bars. That is where he gets his six feet and a half; two feet and a half is the natural width of the cars one from the other. "Found the draw bar down again." I should think he would. I should think he would when he went back again, assuming that these witnesses are testifying truthfully that the coupling was made when they came up there; at any rate, when they backed off the bridge and would keep backing it would not make any particular difference whether they were coupled or not; they would keep pushing back as far as that is concerned if they just kept going and there wasn't anything happened so they would separate as when they were separated on this occasion. But no matter. That is when he gets down to fixing the coupling and repeating the operation when the accident happened. This is the second backward motion. Is there anybody else claims any more backward motions than two? The plaintiff says there were two; Rocheleau says there were two and the engineer says there were two, and the conductor says that he thought his caboose moved? When? When? Not when the brakes were set in emergency. The only time the caboose could move was on this second backing up when Goneau says, "I [fol. 698] started for Gordon and we went about twenty feet when she broke in two again." That is the only time the conductor could see it, according to their defense as they want you to read it out, spell it out from Rocheleau, and the other is when he backed up this second time which was for the purpose of making a coupling and they stopped when the impact was made. If that is true, then the brakes were set in emergency on the rear and the caboose could not have moved at all and Sam Bailey is mistaken—Sylvester Bailey his name is; nickname Sam—he is mistaken when he saw the caboose moving.

Mr. Palmer: Now, I except to that as at variance with the testimony.

Mr. Anderson: If the court please, counsel knows that is not a ground for an exception.

Mr. Palmer: All right, I take an exception to that.

Mr. Anderson: What is wrong about it, counsel, if the court will permit me to ask?

Mr. Palmer: Mr. Bailey didn't say that.

Mr. Anderson: He didn't? I suppose you want us to understand you think your memory is better than mine. The jury will remember the testimony.

The Court: I do not think counsel should interrupt on such a matter.

Mr. Palmer: I won't interrupt, your Honor. I simply took an exception.

Mr. Anderson: You gentlemen will remember the testimony and Sam Bailey did say that he saw that caboose move, sir.

Mr. Palmer: I except to that.

[fol. 699] Mr. Anderson: That is the only time it could have moved under the conditions described or claimed by the defendant in this case. I repeat it. So much for that.

\* \* \* \* \*

Well, now, here is a point that the defendant hugs. "The cars were coupled together," says Rocheleau, "when I got down there." Well, of course, you know you do not have to accept Rocheleau's testimony as an absolute verity in this case, do you? Rocheleau is the man who said to the claim agent, "This man was unconscious when I went to him and he never made any statement as to how the accident happened after the accident happened." That is the man who comes into court with that over his signature in September, 1921, and yesterday or day before. That is the man who comes here and swears before his God that that statement that he made to the claim agent is a lie and that, "Now I am telling the truth; he stepped off, that is what he said," he says. That is the man who says the train was coupled up. That is the man who says, "I did not couple the air hose," and that is the man who says when he came down there he got down off the top of the cars and went down and looked at the coupler and that is the man who says that he closed the angle cock, and then that is the man who says that he heard the moaning before he did this, but that he closed the angle cock so he would be sure to be able to locate the moans. That is the man upon whom they are basing their entire defense in this case, corroborated in so far [fol. 700] as it can be by long-legged Bailey. And that is what their defense is in this case. What do you think of it? Will it hold water? Will it shut out the light? Is that the kind of testimony men are going to base verdicts on? I think not.

Now, I am going to assume that the train was together, just to see how it works out. Goneau said—no, I didn't—yes, I guess I asked him if he did not close the angle cock on the crippled car

when it broke in two the second time. Now, I know something about railroading. That appeals to me as a verity, as the kind of testimony that would be given by an intelligent, experienced railroad man. And you remember that track was up-grade from there to the Omaha bridge and from the Omaha bridge down towards the engine was on the down grade again; you remember that he said that the Omaha bridge was up; so that these cars—how many of them? I will make that 20, 30, 30 cars or a large part of them were standing at a down grade. If he closed the angle cock as Barnaby said, the air would pump in and release the brakes. That would enable the cars to settle back. It may be Goneau did close that. I don't know. You don't know just what men will do and I want to say, Goneau being injured as he was at that time, cannot be expected to remember every little detail. He might have closed it. Let us assume he did. What will happen? Pull upon that carrier iron one pull and then another and went back off the bridge. If that angle cock was closed those cars would settle down, back down that grade that little distance of four [fol. 701] feet and bring the couplers together. You noticed when I asked Barnaby about it he said the cars would not move on that down grade. Oh, well, I don't know what you think about it, but round wheels naturally have a tendency to roll down hill and the slighter the hill the slighter the roll and the steeper the hill the faster, that is about the size of it. Of course, I just mention that. Of course, personally—do not misunderstand me—personally I do not think the train was coupled at all when Rocheleau got there; have no such thought, no such thought whatever, but I am just mentioning it for what it is worth.

Now, then, another thing. Notice that their whole defense is based upon Rocheleau. I have said a good deal about it. Let us say something more about it. I am appealing to the good common sense of you twelve men. If you do not agree with me that is all right. You are the final judges in this matter. I am only trying to help. If what I say is not reasonable, is not logical, why, reject it. That is all right. But we are speaking now about Rocheleau and whether Rocheleau is right in his story in whole or in part. You take this situation and see how it works out. Here are the two ends of the train. Now, remember that Rocheleau estimated that it was from eight to twelve cars from his engine to the Omaha bridge, eight to twelve cars at the outside. The admitted fact is it is thirty cars from the caboose to the place where the train broke in two, so we have got at this end Goneau getting his tools, getting out of the caboose, walk-[fol. 702] ing up car by car, examining things, and reaching the bridge, getting over the bridge, finding the defect and, according to Rocheleau as to signals, must have fixed something, must have done something, and still Rocheleau walked eight, nine, ten, twelve car lengths and fixed nothing. Rocheleau says that, "As soon as I got to the Omaha bridge eight to twelve cars from my engine, and I got from my engine and started immediately, Goneau gave a back-up signal." Do you believe it? Where was Rocheleau? He wasn't

there at all. He was on top of the train. That is where he was. If he had been down by the side of the train and walking along he would have been down where Goneau was long before Goneau got anything fixed up there. Just notice it; reason it out. That is the situation there. I am talking about that simply as bearing upon the truthfulness of this man Rocheleau, the credibility of this man Rocheleau. Can you believe him? Can you believe him as against this man Ernie Goneau who had worked himself up and had this regular run and was making \$200.00 a month or \$2,400.00 a year, with no attempt to correct it or deny it; substantially, I mean by that, of course, because we all know it varies. But that is his testimony, in substance, \$200.00 a month, working steadily for four years and altogether for twelve years for the Soo. Which are you going to believe?

\* \* \* \* \*

Well, they talk about Sam Bailey coming over to that train. Now, don't forget that Rocheleau testified that he came down to the scene [fol. 703] where this train parted and the way he wants to explain that he discovered anything wrong was that he heard air escaping. Well, he says he got down. He was there. I don't know what he did. I don't know whether he gave a signal to back up then and I don't know whether Mr. Rocheleau, after Goneau fell, gave a back-up signal by mistake or otherwise. I don't know whether the slack settled back. Poor Goneau was under the bridge and doesn't know. It doesn't decide one way or the other whether Goneau was hurt as he said, but I don't know. Well, after he had been there some time and heard groans he went down below. We don't know how soon he went down below; we have simply got Rocheleau's word for it. Then in due time Bailey realized that time was passing and he didn't know what was the matter. He sets out a fuse and he goes up there on top of the train or on the ground.

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Sam Bailey doesn't remember whether he went up on top of the cars all of the way or all of the time, but he went up. Of course, he went up and he went down and did Sam Bailey say anything about this man saying how he got hurt? Sam Bailey is the conductor on this train. Sam Bailey is the man who is responsible for this train. Sam Bailey is the man who is in charge of Goneau as his superior. Anything in this case where Sam Bailey undertakes to testify and say this man said how he got hurt? No. That comes from the easily persuaded lips of Barnaby and Rocheleau. Well, I [fol. 704] am going to pass over rapidly because Sam Bailey cuts no figure in this case one way or the other, except he impressed me on the whole as being a pretty square sort of a guy. And when it came to remembering things he could not remember these things very definitely, but to my best recollection. You remember about the coupler. He said, "Yes, when I got there the couplers were together." "Were they coupled?" "Well," he said, "I don't know whether

they were coupled very good or not, but they were together all right and the air hose was connected up and the angle cock was shut off on the crippled car." You remember that. He so testified. He may be wrong about it; perfectly honest, I am not saying that. I don't care one way or the other. The accident happened long before Sam Bailey got up there. Then he goes on and goes back. Oh, by the way, I don't know what it is worth, but I just want you gentlemen if you happen to think about it when you get out, to put yourselves down there at the bottom of the river, because this man Rocheleau at the time he testifies that I am going to speak about is down on the ground by the river, away down from where he said this man's imprint was on the ground. This man Rocheleau went so far as to carefully examine to see where this man's butt hit the sand and could tell just where it was. He comes into court here a year after the accident and marks on a map just where it was, on a dark stormy night. Yes, very likely. At any rate, he went down and he says, "I am the conductor coming up—" oh, I don't [fol. 705] know how far he said, ten or fifteen cars, from the east, saw the lantern when he is down there in the river thirty feet below the bank or something. I am just wondering how he saw him. But I just mention it. The inconsistency and improbability of Rocheleau's story makes this case smell. So much for that and so much for Bailey—oh, yes, counsel says Bailey said it was the left end of the carrier iron that was down. No, counsellor, of course you are younger than I am your brain ought to be fresh, but what the conductor said was that he was under the impression it was the left end that was down. You know, under the impression, I think it was. The first thing you know if we tried this case another day they would have both ends down and the whole thing lying on the ground before they got through. So much for that.

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Let us take up the other branch of it, this new evidence that they brought in, this solar plexus blow that they poked into the plaintiff's case when they brought the car foreman here and the gentlemen from Pennsylvania and that well-preserved man fifty-eight years of age or sixty-two from down in Minneapolis who says he takes exercise. He was a fine looking chap, wasn't he? I don't think I would want to tackle him. He happens to be the same age I am. I am just one of these soft, flabby-muscled lawyers. Then they had another gentleman here, superintendent of some department. I did not cross examine him. I did not have any reason to ask him any questions. What is the result? The result is we find now, as [fol. 706] I told you before, a badly done up car to start with. In the second place, we find that Mr. Goneau was probably mistaken as to the exact character of the carrier iron. Well, can you criticize him very much? How about Conductor Bailey? He didn't know it was any different or he would have said so at the last trial and he would have said so now. Nobody questioned Goneau's estimate in the dark and storm about the kind of a carrier iron. All right.

We will let it go at that. We find we have a carrier—what is that other word?

Mr. Palmer: Angle iron.

Mr. Anderson: Angle iron, carrier iron. Now, you see, he has got a better brain than I have. That is the reason he is a railroad attorney and I am a poor dub grubbing outside. They bring in that kind of a carrier iron and when the car foreman saw it it was hanging by its teeth and the tooth over on the left end seven inches long. You know what that means, don't you? It means that the confounded thing had all come out, all of the bolts, very one of them and they picked up and put on a seven inch bolt on this end and a four and a half inch bolt over here. That is what that means. That is what that means and that is the way they repaired it somewhere. Well, then, they asked these learned gentlemen—I haven't got time to waste on this—"Did you make some experiments?" "Yes, you bet we did." "What were they?" "Why, we unbolted the right hand nut on this carrier iron and we loosened up the seven inch—[fol. 707] no, we put a seven inch bolt—took out all the bolts, put in a seven inch bolt in the left end and put in a thing-um-a-bob, that nut, I don't know what you call it above the nut you screw on, we left it down—I don't know how much they left it down, somewhere, I don't care, and then we dropped down loose the right nut." "What happened to the draw bar?" "Dropped down three inches." "Three inches? Well, how far did the carrier iron drop down?" "Why, three inches." "Well, did it go down far enough to clear that five inch obstruction over here?" You gentlemen remember that thing five inches long; five inches long, that is what they say. I haven't measured it. You know what I mean, gentlemen, what it is bolted to. You remember in the picture it looks like that (indicating). "Now, how far did the outer end of his carrier iron come down?" This is direct examination. "Did it come down below that so it would pass it?" "Oh, no." Well, then, you can bet your bottom dollar the center part didn't come down three inches. You know what I mean. Here is the center line ten inches from the end out there (indicating). Now, if you drop this center line three inches there (indicating) you can bet your bottom dollar that is going to be down six inches (indicating). You know what I mean. Here (indicating) is the fulcrum, swinging on a fulcrum half way down you go three inches down; then of course ten inches further that is down six inches. Well, they admitted that. You remember the draftsman, he admitted that. Well, if it went down [fol. 708] six inches it would clear that thing. Then they asked was it possible for this carrier iron to go back? No. Why not? Because it would strike this iron here. No other reason for it not going back? No. Well, now, just rapidly. You remember the testimony. I asked these experts how long this knuckle was. Four inches. You know I made a mistake with the car foreman when I asked him. I got mixed. I got my wires crossed. I remember asking him, it would have to drop down four and a half inches, wouldn't it, to uncouple. Well, when I went home and had my

supper and had a nice sleep, I says, "I guess you have forgotten, Anderson, every blamed thing about mathematics you ever learned. How are you going to get a nine inch thing to pass another nine inch thing by dropping it four and a half inches?" So I came back and when we got the other gentleman on the stand, the expert, this white haired gentleman, he said, "Why, of course." And when counsel commenced to ask him questions he said, "Why, of course, it would have to drop nine inches or if there is any inequality in the track, say like three inches and the other coupler happened to be down three inches, why, then it would only have to drop six." And the maximum and minimum on draw bars is only three inches. So he admitted it would have to drop six inches in order for it to uncouple. I mean in this accident. I do not mean in these baby tests they had over there, handling those irons for fear they might scratch the paint off. There wasn't much on, you remember. That [fol. 709] is the kind of experiment and theory they made. Why, do you know my friend, John Palmer, here is drunk on theories. He talks about theories, theories until he is swelled up. Oh, I would like to tell you the cat and mouse story, but I haven't time. It is a peach. Then he asked him, "Now, when you got that carrier iron low enough to go by that end over there, can you push it back?" "No." "Did you try it?" "Well, yes." Well, then, on cross examination I wanted to know if he ever made an experiment where you are operating the train and the whole draw bar comes down so as to drive it down far enough, what would happen to it then as you are butting back and forth and the carrier iron is getting lower and lower and when it finally gets low enough to pass the obstruction here and it is being driven back, what will happen to it then? Well, they were kind of—I don't know; my recollection is they were standing in the mud. Now, I don't know what they did say, but I know what you will say. I know what any man of honor will say who has sense. The carrier iron will go back. Counsel says it is impossible for it to go back; it would come forward. Come forward; how could it? I wish I had a little draw bar here. You know what I mean. Let my body out here be the draw bar, drop down this way (indicating), there is a shank sticking back behind and as their own car foreman said, from the appearance there had been another coupler come over it, but here is the carrier iron down too (indicating). Counsel says it would work this way (indicating). How in thunder would it work against this down sloping iron? [fol. 710] Wouldn't it work up where it had a chance to get away? Now, I am not going to spend any more time on that. You heard the testimony and you know perfectly well that the carrier iron could not possibly let the couplers uncouple until it was down below the end of that obstruction. You know that. If it dropped three inches only, and of course it would not uncouple in three inches, the outer end would be six; if it dropped four inches the outer end would be down eight inches; and if it dropped five the outer end would be down ten inches, pressed down by those hundreds and hundreds of pounds and the smash of the train and then when it got by the obstruction it would go back. Notice. Notice, the draw

bar was never down far enough to uncouple; it was working down and it was being forced until the carrier iron got away from this thing and then passed down and down, when the draw bar then separated. That is what happened, until it came uncoupled. When Goneau gets there he finds the carrier iron back under there. Of course, he says it was back, he don't know, clear to the end of the draw bar. Of course, the man don't know. And he gets hold of it and works it back and makes a coupling and it parts again and today he sits here and all his life he will sit as he goes through life, all the way a cripple. Why? Because the railroad company did not see fit to perform even its common law duty, let alone its statutory law duty. That is why. I would like to talk more in detail about it, but I am not going to. You know what the facts are in [fol. 711] this case. You remember the evidence and you know and I know that you know as twelve honest men that there is not a scintilla of merit in the so-called defense in this case. You know that this experienced man was thrown from that bridge by some extraordinary thing and we have alleged and we have proved and there has not been a word to deny it that he was working on that carrier iron, trying to get it back, trying to overcome the result of his master's negligence, when the thing slipped and made him lose his balance and fly off that bridge. And counsel said he had his lantern in his hand. I wondered whether counsel ever lived on a farm and used a lantern and kept the handle of the lantern in his hand. Let it hang in your arm, let it hang there where you can see, get hold of things and pull. That is what this man was doing, standing there and pulling with the lantern on his arm. Counsel seemed to think it was a remarkable thing that he had the lantern. Where would he have his lantern, down there somewhere where it would give him no light? I think not. But I haven't got time to waste on that.

Just a word about this draw bar. When you are speaking of the draw bar and the draw bar resting there that day, I think they estimated 200 to 250 pounds pressure resting on the carrier iron, Ernie Goneau could not raise it with his knee, nor could any of you. Notice what I am saying. If the draw bar was resting its full weight on that carrier iron, you could not raise that 200 or 250 pounds with your [fol. 712] knee, whether it was a long or short reach. But I again thank the Soo Railway Company. I have often wondered why Goneau was able to do it with his leg, his thigh or whatever it was whether his knee was against it or whether he is mistaken and used his shoulder, got down under with his shoulder, got down under with his shoulder to help, or what the facts are, I often wondered how he got it loose. Now, we know, because the car foreman says that the shank rests back in some thirty, twenty-seven, inches in a pocket and that shank is in an enclosure, plates and things of that sort and that those plates and that enclosure and all that pocket was bent down some; he said part way. Counsel asked him if it was an old bend. Yes, old, an old bend. Well, what happened was the draw bar was forced down and the pocket back there was holding it and the carrier iron also, and all you had to do to it was to tip it up a little bit.

Counsel says nothing could hold it, nothing could make it stick. Oh, such rot, nonsense. I don't like to say it. You know what will happen under the conditions there. Goneau says it did stick and if it didn't why did he fall? Of course it stuck.

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### CHARGE TO JURY

Gentlemen of the jury: It is my purpose and it will be my effort, in as plain and concise a manner as I can, to call your attention to the issues of fact in this case and to the principles of law that are applicable to it. You are the judges of the facts. It is not my [fol. 713] province to determine any of the facts and I do not intend to discuss the evidence with that end in view. It is my duty to call your attention to such principles of law as are applicable to the case and to, as best I can, call to your attention the issues of fact involved, but not to discuss the evidence, and it is your duty as jurors to accept the law as I state it to you, whether my statements of what the law is are in accord with your own opinions as to what the law is or should be. The statements which I make become the law of this case and you are bound by them.

When this case is finally submitted to you and you retire to your jury room for deliberation you should make good, honest effort to solve the questions involved and to agree upon a verdict. If you find that you disagree in some particulars, you should listen attentively to the arguments of each of your brother jurors, discuss the various propositions that may arise with them and in a calm, considerate manner honestly endeavor to agree upon a verdict.

The plaintiff in this case, Mr. Ernest J. Goneau, brings this action against the railroad company commonly known as the Soo Railway Company for a sum in damages because of injuries alleged by him, the plaintiff, to have been sustained by reason of an accident which occurred on a Soo Railway train on the 27th day of October, 1920. It is the claim of the plaintiff that on that date, the 27th day of October, 1920, this train, a freight train of the Soo Railway Company, reached and stopped upon a bridge; that it so stopped [fol. 714] for the reason and because one of the draw bars in one end of one of the cars in said train, and constituting a part of the automatic coupler upon said car, was defective, broken and out of order so that said automatic coupler uncoupled and caused the train to break in two.

Plaintiff further alleges that it thereupon became his duty as brakeman to couple said cars; that in order to do so it was necessary for him to go between the cars, which he did, and for him to repair and readjust and replace the draw bar in position so that the two cars could couple on impact. He alleges, further, that a certain iron known as a carrier iron and extending underneath the draw bar had broken and fallen from its position, thus permitting and

causing the draw bar to drop so that the coupling could not be made, and so that the two draw bars, if coupled, would not remain coupled.

He further alleges that in order to do this work it was necessary for him to stand upon the bridge and that while he was endeavoring to readjust and repair the coupler so as to enable the coupling to be made, the carrier iron which he was attempting to draw back into place suddenly gave way and he was then thrown from his position and caused to fall from the bridge a distance of about forty feet to the ground, whereby he was seriously and permanently injured.

He alleges that the condition of the carrier iron was owing to the carelessness and negligence of the defendant company, and then he [fol. 715] alleges that by reason of the fall he suffered serious injuries, resulting in the fracturing of several ribs, the impairment of his left lung, of his left shoulder and arm, that the muscles and nerves about them were injured and weakened, that his spine was injured, that his sacroiliac joint was injured, that his heart action was impaired, that he suffered great anguish and pain.

The defendant company denies that it was negligent and denies that serious and permanent injury resulted to the plaintiff.

Now, there are certain facts which, from the pleadings and the evidence, stand admitted. They are established. It is admitted that the plaintiff was in the employ of the Soo Railway Company as a brakeman on the day in question, that he was a brakeman on an interstate train, that is, a train engaged in interstate traffic, traffic between states; that that train, comprising about seventy freight cars, was on its way on the day in question from Ladysmith to Superior; that when the train was a short distance west of the station of Gordon, at about seven o'clock in the evening of that day, the train did come apart and that it came apart, separated, on the bridge over the St. Croix river. As I understand the pleadings and the evidence, there is no question between the parties up to that point. Then there is a conflict in the testimony as to what took place and how the plaintiff came to fall and when he fell from the bridge. I will not undertake to review the evidence, either of the plaintiff or of the other [fol. 716] trainmen, as to what took place that day. I know you have given it careful attention and I wish to impress upon you now that just what did take place while the plaintiff was on this bridge or trestle and just before he fell from the bridge or trestle, is very important in this action and I invite your closest scrutiny of the testimony bearing upon that feature of the case. I have already stated to you that it appears beyond dispute that this was a train engaged in interstate commerce. Because of that fact, because this accident took place on such a train, it becomes our duty to try this case under the Federal law, under the law of the United States government, as to the operation of such trains and not under the law of either the state of Minnesota or the state of Wisconsin.

The plaintiff bases his action upon the alleged negligence of the railroad company and the plaintiff is not entitled to recover in any amount in this action unless the defendant railway company was

negligent at the time in question and such negligence, if such negligence existed, must have been the proximate cause, the direct cause, of the injury. Those facts must be established by a preponderance of the evidence to entitle the plaintiff to recover in any amount in this action.

So it becomes necessary for me to call your attention to the Federal laws to which I have referred. We have a Federal law which is commonly referred to as the Safety Appliance Act applicable to railway companies; it has application to railway companies or common carriers engaged in interstate commerce; and so, it being admitted [fol. 717] that this train was engaged in interstate commerce, it has application in this case. It provides, so far as important in this action, quoting from that act, "That on and after the 1st day of January, 1898, it shall be unlawful for any such common carrier to haul, or permit to be hauled or used on its line, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which cannot be uncoupled without the necessity of men going between the ends of the cars." This is a law evidently enacted for the purpose of the protection of the employes of a railway company and means that the coupling devices coupling cars of railway trains must be equipped with automatic couplers such as will couple by impact and which can be uncoupled without the necessity of men going between the ends of the cars. The Federal law also provides that, quoting again, "Every common carrier by railroad while engaged in commerce between any of the several states shall be liable in damages to any person suffering injury while he is employed by such carrier for such injury as results, in whole or in part, from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed or other equipment."

The law requiring couplers such as I have called your attention to and such as the law defines, makes it mandatory upon a railway company to provide such coupling devices upon all cars used in interstate commerce and its failure to do so would constitute negligence, [fol. 718] as a matter of law, and injury resulting from that negligence would render the railway company liable in damages.

Now, one of the questions of fact which I deem it proper to submit to you in this case is whether this particular car involved in this action, about which you have heard testimony, was equipped with the coupler as required by law. It appears from the testimony that the claimed defect in the car which caused, as is claimed, the dropping of the draw bar so that a proper connection or coupling could not be made, was in a carrier iron, an iron about which some testimony has been heard, which has for its purpose, as I understand the testimony, the support of the draw bar. It is contended by counsel for the defendant railway company that that carrier iron is not a part of the coupler and that any defect in the carrier iron or in the manner in which it was adjusted or attached to the car, would not constitute a defect in the coupler. I understand the contention of the plaintiff

to be to the contrary and I am submitting to you that question of fact to determine from all of the evidence in the case, whether the carrier iron referred to constituted a part of the coupling device and whether, in the condition in which it was, it rendered the coupling device defective, or, in other words, whether the carrier iron was a defective part of the coupling device. If you find that it was and that the condition of the carrier iron was such that it rendered the coupler inadequate to cause a coupling to be made automatically [fol. 719] by impact and so that the cars could not be uncoupled without the necessity of men going between the ends of the cars, I say, if you find affirmatively upon that fact, then you would necessarily find that the defendant company was negligent in that regard, negligent in its failure to comply with the Safety Appliance Act, the particular language of which I have called to your attention.

If you find that the carrier iron was not a part of the coupling device, then there is no evidence in this case which would warrant you in finding in favor of the plaintiff in any amount because the action brought by the plaintiff rests upon that claim, upon that allegation made by him that the defendant was negligent in that particular manner, that is, because of a defective coupler, and unless that is sustained by the evidence the plaintiff would not be entitled to recover and there is no other claim of defect in the coupler except that occasioned by the condition of the carrier iron or the manner in which it was attached to the car. In other words, in order to base a finding of negligence against the defendant on the alleged defective condition of the carrier iron, you must find from a preponderance of the evidence that the carrier iron was a part of the automatic coupler as defined or contemplated by the Federal Safety Appliance Act. If you do not so find, this case does not come within said act and your verdict must be for the defendant. But if you find that the railway company was negligent in this regard, in order to find that the defendant is liable in damages in any amount, you would [fol. 720] need to go further and find that this defect was the proximate cause of the injury sustained by the plaintiff, because unless the injury resulted proximately from this defect, there would be no liability on the part of the defendant railway company. The question of the proximate cause of an injury is ordinarily one of fact, to be solved by the exercise of practical sense, rather than by the application of any abstract definition of the term. It is in this case a question of fact and a proper one for you, as jurors, to determine.

Frequently an injury is the result of a series of successive occurrences standing in the relationship of cause and effect. The immediate cause is not necessarily the one upon which actionable negligence must always be predicated, but often one more remote to which the immediate cause is in some manner due. In such case the original cause which sets the others in motion, if occurring through someone's negligence, gives a cause of action to the person ultimately reached and injured and if the injury is produced by several concurring acts or conditions, the one guilty of one of these may be held for the whole consequence. If the coupler in this case

was defective, then, under the statutory law, the defendant was negligent and if the defendant was negligent it is liable for all the natural and proximate consequences of such negligence. If you find from a preponderance of the evidence that the carrier iron was a part of the automatic coupler required by the Federal Safety Appliance Act and that it was actually defective in the respect claimed by the [fol. 721] plaintiff, you must then go further and find from a preponderance of the evidence that such defect contributed directly and proximately to the plaintiff's injury. There must be established by a preponderance of the evidence a causal relation or connection between the violation of the statute and the injury of the plaintiff; and if you do not find from a preponderance of the evidence such causal connection or relation between the defect in the carrier iron and the plaintiff's fall and injury, then your verdict must be for the defendant.

Proximate cause is that cause except for which, and without the existence of which, the injuries of which the plaintiff complains would not have happened. The accident and injury must result necessarily and naturally from the wrongful act complained of and must be such results and consequences as the defendant ought reasonably to have foreseen would result from the alleged unlawful conduct on its part. In other words, the proximate cause of an injury is the primary moving cause without which the injury would not have been inflicted; it is such a cause, as in the natural and probable sequence of events, and without the intervention of any new or independent cause, produces the injury. And if, in this case, you find from the evidence that the proximate cause of plaintiff's injury was his stepping off the edge of the bridge, or his stumbling or tripping upon the timbers of the bridge, or his losing his balance and falling over the edge of the bridge, then, under any [fol. 722] or either of such findings, your verdict must be for the defendant.

If you find that the defendant was negligent, under the evidence and the instructions of the court, and that such negligence was the proximate cause of the injury, then it will be your duty to find a verdict for the plaintiff, without regard to the questions of contributory negligence or assumption of risk, because, under the Federal law, contributory negligence is not a defense in any case where the violation by the common carrier, the railway company, of any statute enacted for the safety of employes contributed to the injury of the employe; and the same rule applies to, the same form of statute covers, the claim of assumption of risk. And so, for those reasons, under the Federal law, it makes no difference in this case whether the plaintiff was himself negligent and therefore guilty of contributory negligence or whether the plaintiff did assume the risk of the work performed by him or attempted to be performed by him at the time. So you will disregard those two questions of contributory negligence and assumption of risk; and if you find that the defendant railway company was negligent and that such negligence was the proximate cause of the injury, you will find in some amount for the plaintiff. Of course, the converse is true, unless

you find that the railroad company, the defendant, was negligent and unless you further find that such negligence was the proximate cause of the injury, then your verdict must be for the defendant and you would not be justified in returning a verdict for the plaintiff in any amount.

[fol. 723] If you find from the evidence that the plaintiff fell from the bridge when the train was coupled together and not in motion, then your verdict must be for the defendant.

If you find from the evidence that the injuries of which plaintiff complains were occasioned in any other manner than by the slipping of the carrier iron when he was pulling upon the same, your verdict must be for defendant.

It was the duty of the plaintiff, as set forth in his complaint and as testified to by him, to place in position the carrier iron with due regard for his own safety, situated as he was upon the bridge as testified to by him, and if you find from the testimony that the injury arose from any other act than an attempt to couple the cars with the couplers, your verdict must be for the defendant.

If you find from the evidence that any act of the plaintiff was the sole cause of his injury and that the alleged unlawful conduct of the defendant was no part of the causation, then your verdict must be for the defendant.

If plaintiff was attempting to bring the draw bar back to its proper position so the coupling could be made at the time that the accident occurred, then the protection of the act to which I have called your attention extended to him while he was so engaged.

If you find, under the evidence in this case and the instructions of the court, that the plaintiff is entitled to recover in any amount, then it will be your duty to consider the question of damages. Of [fol. 724] course, in case you find that the defendant was not negligent or that such negligence, if any, was not the proximate cause of the injury, then you would need to give no consideration to the question of damages. But if you find for the plaintiff at all, you must take up and consider the question of damages and determine the amount that you will award to the plaintiff as such. In that case, if you award damages in any amount, you should award such amount as will be justly compensatory to the plaintiff for the injuries sustained by him. You should take into consideration the pain and suffering endured by plaintiff, if any; his loss of time by reason of the injury; the impairment of his earning capacity in the future; and the pain and suffering that he may endure in the future, if, under the evidence, you believe that he will in the future endure pain and suffering. You should take into consideration the earning capacity of the plaintiff at the time of the accident, his age, and the likelihood of the injuries being of short duration or of a permanent nature. You should consider all of these matters, if you find for the plaintiff at all, and find such an amount in damages as will be justly compensatory to the plaintiff for then injuries sustained.

Always when the question of damages because of personal injury is reached in a case the court finds it difficult to lay down any

very precise rule by which a jury can be guided. It should be such an amount as will compensate the plaintiff for his injury and it [fol. 725] should be no greater sum than such amount. It must be left almost wholly to the good, common sense, good judgment, of a jury, the jury taking into consideration all of the circumstances disclosed by the evidence. You are acting in a judicial capacity in this case. Your verdict must be determined by a careful, honest consideration of the evidence which you have heard during this trial and you must be guided wholly by that evidence. You must not be actuated in the least by sympathy or prejudice against either of the parties to this action, but you must fairly and impartially, candidly and honestly, to the best of your ability, determine the facts from the evidence in the case.

Considerable evidence has been given during this trial by medical experts. All of that testimony will be considered by you and all of it given the weight by you to which you deem it entitled. You are the exclusive judges of the credibility of the testimony and you have a right to, and you should, in determining the weight that you will give to the testimony of any witness, whether an expert or other witness, take into consideration the interest of the witness in the result of this trial, his appearance and demeanor on the witness stand, the probability or improbability of the truth of the story told by him, of the testimony given by him, its reasonableness or unreasonableness, as you view it, the apparent knowledge of the witness as to the matters about which he testified, and so from it all determine the weight that you will give to such testimony.

[fol. 726] Upon all the issues submitted to you in this case the burden of proof is upon the plaintiff and he must sustain that proof by a fair preponderance of the evidence; and if upon any of the issues submitted to you, you do not find in the plaintiff's favor from a fair preponderance of the evidence, the plaintiff must be deemed to have failed in his proof and your verdict must be for the defendant.

It is immaterial in this case whether the car having the coupler which dropped and became uncoupled, if you so find the fact to be, was the property of the defendant or of some other person or corporation, for the reason that the law makes it unlawful to haul or use any car with a coupler not complying with the provision of the act.

You are instructed that it is immaterial whether the defendant knew, or in the exercise of ordinary care should have known, of the condition of said coupler or carrier iron or the weakness or insufficiency of the said carrier iron or support, for the reason that the duty imposed upon the defendant by the statute in question is continuous and absolute and that the common law rule as to the exercise of ordinary care has no application.

Gentlemen, I think of nothing further that I deem it necessary to call to your attention. I have endeavored to call to your attention the issues of fact and the rules and principles of law which I deem applicable. I wish you to bear in mind that, in order to find for the plaintiff in any amount, you must find negligence on the part of the

defendant, you must find that such negligence was the proximate [fol. 727] cause of the injury and unless you do so find, your verdict should be for the defendant.

You will bear in mind, too, that you should give no consideration to the questions of either contributory negligence or assumption of risk.

If you fail to reach a unanimous agreement within twelve hours after you begin your deliberations then, after that time, after you have deliberated twelve hours, ten or eleven of your number may agree upon a verdict, in which case in case the verdict is found by ten or eleven of your number each of the ten or eleven concurring jurors must sign the verdict; otherwise, if the verdict is unanimous it need be signed only by your foreman. If you agree upon a verdict when court is not in session, you may seal the verdict and deliver it to your foreman and then come into court with your foreman and deliver the verdict when court next convenes.

Considerable time has been taken in the trial of this case. It has been tried with its utmost care by counsel and now it devolves upon you as jurors to render a verdict that expresses the truth. We have tried this case in order to ascertain the truth and now we must depend upon you to declare it by your verdict. Take the case, gentlemen, and give it that thorough candid, honest, painstaking consideration to which it is entitled and then return the verdict that is in accord with your very best judgment, that you believe to be right and that will have the approval of the conscience of each one of you. I will give you only two forms of verdict, one in favor of [fol. 728] the plaintiff, in an amount left blank; the other in favor of the defendant; one of which you will return.

The Court: Gentlemen, have I overlooked anything?

Mr. Palmer: No, 22, if your Honor please.

The Court: Oh yes, that is right. There was one instruction which I intended to give you and should give you that I wish to add. It is this: If plaintiff's injuries were occasioned in any other way than by the slipping and the pulling towards himself of the carrier iron as asserted by him, your verdict must be for the defendant.

Gentlemen, you may retire with the officer.

#### DEFENDANT'S REQUESTED INSTRUCTIONS GIVEN TO JURY

The following requests to charge were made on behalf of defendant and given by the court:

#### I

Upon all the issues submitted to you in this case the burden of proof is upon the plaintiff and he must sustain that proof by a fair preponderance of the evidence; and if, upon any of the issues submitted to you, you do not find in the plaintiff's favor from a fair

preponderance of the evidence, the plaintiff must be deemed to have failed in his proof and your verdict must be for the defendant.

#### IV

In other words, in order to base a finding of negligence against the defendant on the alleged defective condition of the carrier iron, you must find from a preponderance of the evidence that the carrier iron was a part of the automatic coupler as defined or contemplated [fol. 729] by the Federal Safety Appliance Act; and if you do not so find this case does not come within said act and your verdict must be for the defendant.

#### VII

If you find from a preponderance of the evidence that the carrier iron was a part of the automatic coupler required by the Federal Safety Appliance Act and that it was actually defective in the respect claimed by the plaintiff, you must then go further and find from a preponderance of the evidence that such defect contributed directly and proximately to the plaintiff's injury.

#### VIII

There must be established by a preponderance of the evidence a casual relation or connection between the violation of the statute and the injury of the plaintiff; and if you do not find from a preponderance of the evidence such casual connection or relation between the defect in the carrier iron and the plaintiff's fall and injury, then your verdict must be for the defendant.

#### IX

Proximate cause is that cause except for which, and without the existence of which, the injuries of which the plaintiff complains would not have happened. The accident and injury must result necessarily and naturally from the wrongful act complained of and must be such results and consequences as the defendant ought reasonably to have foreseen would result from the alleged unlawful conduct on its part. In other words, the proximate cause of an [fol. 730] injury is the primary moving cause without which the injury would not have been inflicted; it is such a cause, as in the natural and probable sequence of events, and without the intervention of any new or independent cause, produces the injury. And if, in this case, you find from the evidence that the proximate cause of plaintiff's injury was his stepping off the edge of the bridge, or his stumbling or tripping upon the timbers of the bridge or his losing his balance and falling over the edge of the bridge, then under any or either of such findings, your verdict must be for the defendant.

## XII

If you find from the evidence that the plaintiff fell from the bridge when the train was coupled together and not in motion, then your verdict must be for the defendant.

## XIII

If you find from the evidence that the injuries of which plaintiff complained were occasioned in any other manner than by the slipping of the carrier iron when he was pulling upon the same, your verdict must be for the defendant.

## XIV

It was the duty of the plaintiff, as set forth in his complaint and as testified to by him, to place in position the carrier iron with due regard for his own safety, situated as he was upon the bridge as testified to by him, and if you find from the testimony that the injury arose from any other act than an attempt to couple the cars with the couplers, your verdict must be for the defendant.

[fol. 731]

## XV

If you find from the evidence that any act of the plaintiff was the sole cause of his injury and that the alleged unlawful conduct of the defendant was no part of the causation, then your verdict must be for the defendant.

## XXII

If plaintiff's injuries were occasioned in any other way than by the slipping and the pulling towards himself of the carrier iron as asserted by him your verdict must be for the defendant.

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DEFENDANT'S REQUESTED INSTRUCTIONS REFUSED

The following requests to charge were made on behalf of the defendant and refused by the court, to which refusal of the court to give said requests to charge the defendant excepted:

## II

The court instructs the jury as a matter of law that any defect in the carrier iron referred to in the evidence was not the proximate cause of the plaintiff's injury, and no finding of negligence against the defendant can be based on a defective condition of said carrier iron; even though you find from the evidence that a defect existed.

## III

The coming off of the nut from the bolt supporting the carrier iron and thereby permitting the dropping down of the draw bar, as retailed by the witnesses is not such a defect or defective condition of the automatic coupler required by the Federal Safety Appliance [fol. 732] Act that a finding of negligence against the defendant can be based thereon, and unless you find from the evidence that the automatic coupler itself, or some essential part thereof, was in a defective condition, your verdict must be for the defendant.

## V

If you find from a preponderance of the evidence that the carrier iron was a part of the automatic coupler required by the Federal Safety Appliance Act, you must then go further and find from a preponderance of the evidence that the cause of its coming down and permitting the draw bar to drop was an actual defect and not a mere condition arising in the ordinary operation of the train.

## VI

If you find that no defect in the carrier iron and the bolts supporting it existed when the train left Ladysmith, and that such alleged defect did not exist until the time of the actual dropping down of the draw bar and the parting of the train such an occurrence would constitute a mere condition of operation and a finding of negligence against the defendant cannot be based thereon.

## X

I charge you that the plaintiff assumed all known and obvious risks of his employment including the risk of doing his work upon the bridge, since he knew he was upon the bridge and that it was not guarded nor lighted and if you find that his fall and resulting injury arose solely from his being upon the bridge and doing his work thereon then your verdict must be for the defendant.

[fol. 733]

## XI

I charge you that plaintiff assumed all known and obvious risks of his employment including the risk of doing his work upon the bridge since he knew he was upon the bridge and that it was not guarded nor lighted; and if you find that his fall and resulting injury arose from his being upon the bridge and doing his work thereon then your verdict must be for the defendant; unless you find from a preponderance of the evidence that his fall and resulting injury was directly and proximately contributed to by the failure of the defendant to have the car equipped with automatic coupling apparatus as required by law.

## XVI

The plaintiff's testimony shows that the portion of the car on which the carrier iron had become loose was but a short distance from the natural ground at the north end of the bridge. It was the duty of the plaintiff to repair the carrier iron and to do so in a reasonably safe manner and in a reasonably safe place and with due regard for his own safety. Unless you find from the testimony that there was some obstacle to his doing so it was plaintiff's duty, for his own safety, to signal the moving of such car to a place where the fall of which he complains would not have happened. As a matter of law, I charge you that if you find he could have readily signalled so as to move said car to a place of safety in order to perform the work on the car which he contemplated, it was his duty to see that the train was moved so that the car would be in a reasonably safe place to work, and if you find that he failed to take such precaution, his injuries are due entirely to his own negligence and you must find a verdict for the defendant.

## XVII

If you find from the evidence that the coupler and carrier iron of the car standing on the bridge and which carrier iron the plaintiff claims he attempted to repair or adjust were of such character or so constructed that the carrier iron and adjacent parts were such that the carrier iron could not be moved in the manner claimed by plaintiff, then your verdict must be for defendant.

## XVIII

It is conceded that the coupling apparatus which plaintiff claims he attempted to fix was on Lehigh Valley car No. 82182, and if you find that this make and construction of the coupling parts at the time plaintiff sought to adjust them were the same as they now are, I charge you that it was and would have been impossible for the carrier iron to have slipped and occasioned plaintiff's fall as and in the manner claimed and testified to by him and you must find for the defendant.

## XIX

If the carrier iron which plaintiff claims he attempted to adjust and the parts of the car or coupling apparatus adjoining the same or connected therewith were such that the carrier iron could not move or slip or be made to move or slip in the manner claimed or testified to by plaintiff, your verdict must be for defendant.

## XX

Plaintiff claims that while he was supporting the draw bar by his knee and was pulling back the carrier iron into position the latter

suddenly slid and moved back toward its position and he lost his balance and fell. He bases his right to recover on the existence of such as facts. Before he can recover he must convince you by a fair preponderance of the evidence that such were the facts otherwise you must find for the defendant.

## XXI

If the construction of the coupling system on the car on which plaintiff claims he attempted to repair the carrier iron was such that the latter would not slip or move in the manner claimed by plaintiff then you must return a verdict for defendant.

## XXIII

If the coupling apparatus described by plaintiff was such that the carrier iron could not be manipulated or moved in the way as claimed and stated by him he cannot recover and you must find for defendant.

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 PLAINTIFF'S EXHIBIT F

Statement of F. X. Rocheleau

Superior, Wis., November 1, 1920.

I was head brakeman on train No. 43, eng. 474, on October 27, 1920, when brakeman Goneau was injured by falling off St. Croix river bridge near Gordon, Wis. Regarding this accident I will state as follows:

[fol. 736] We were running about 20 or 25 miles an hour and I was riding in the engine when the train suddenly parted about 50 cars back. We had hold of 70 cars and when the train parted it set the air automatically and the train came to a stop. I got out immediately when the train stopped and started back to see what was the matter. The part of the train that had parted was then standing on the St. Croix bridge. The weather was very stormy, snowing and very dark. Brakeman Goneau, who was on the rear end, closed the angle cock and gave a signal to back up. This signal was given to connect up the train again. In going I walked on the engineer's side and saw the lighted lantern back there and I knew Goneau was working there. Then Goneau gave the engineer a signal to go ahead. Then he swung him down. I then saw him go in between the cars and then he came out and swung him back again. I saw the lantern come out and then disappear. I was quite a distance from him even at this time and could see nothing but the light from his lantern. I would estimate that I was about 35 car lengths or more away from him. I waited for a little while then and when I did not see any more of him I started back. When I got where he had been I heard him groaning and discovered he had gone over the side of the bridge.

I went down to where he was immediately. He was unconscious when I found him and I did not hear him say how it happened, at any time after the accident. The conductor was coming up and I told him what had happened. The conductor then went back to [fol. 737] the hind end of the caboose and we backed the train up. The coupling had made when Goneau swung the engineer back just before he fell. We backed over the bridge. We cut the engine off and then went over the bridge again. Goneau was in such extreme pain that we could not carry him out and we flagged No. 18 about 25 minutes later and the passengers assisted in carrying him up. We then set 50 cars of our train on the passing track and made a quick run into Superior with Goneau.

I noticed while I was back there Goneau had fallen over that the draw head was down about three inches. I had no chance to make a careful examination as about that same moment I heard groaning down below.

At the time he fell over he was standing on the bridge. There were no sides to the bridge, just the ties sticking out.

As far as I could see, the train was handled properly and when he went over the bridge the train was standing still.

This is correct.

F. X. Rocheleau.

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#### VERDICT

✓ We, the jury empaneled and sworn in the above entitled action, find for the plaintiff and assess his damages in the sum of \$20,000.00 (twenty thousand dollars).

[fol. 738] Dated at Bemidji this 3rd day of March, A. D. 1923.

(Signed) A. L. ASP, Foreman.

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(Stipulation of counsel settling case same as court's order following.)

#### IN DISTRICT COURT OF BELTRAMI COUNTY

#### ORDER SETTLING CASE

Pursuant to stipulation by counsel for the parties hereto, I hereby certify that the foregoing proposed case, consisting of 989 pages of typewritten matter, is conformable to the truth and contains all of the evidence offered or received on the trial of this cause, and also the charge in full, and all objections, rulings, orders and all other proceedings of such trial, except that plaintiff's Exhibit "A," being a photograph of a freight car upon the St. Croix river bridge at Gordon, Wisconsin; Exhibits "B" and "C," being X-ray plates of the plaintiff, made January 7th, 1921; Exhibits "D" and "E" being X-ray plates of plaintiff's chest made in February, 1923; and except also that Defendant's Exhibit No. 1, being a photograph of

the St. Croix river bridge at Gordon, Wisconsin, with a box car and man thereon; Exhibit 2, being a representation of the St. Croix river bridge at Gordon, Wisconsin; Exhibit 3, being a plat of said bridge; Exhibits 4 and 5, being X-ray plates of plaintiff's pelvic area, made in February, 1923; Exhibits 6 and 7, being X-ray plates of plaintiff's [fol. 739] chest area, made in February, 1923; Exhibit 8, being a conductor's train book; Exhibit 9, being a flat piece of iron 7½"x24"x4"; Exhibits 10, 11, 13, 14 and 15, being photographs of L. V. car 82182; Exhibit 17, being a drawing of the construction of the B end of L. V. car 82182, and Exhibit 18, being a drawing of the coupling apparatus of said car, are not included herein; that all of said Exhibits and all other exhibits, if any, received in evidence shall be deemed a part hereof and a part of the settled case herein; and I hereby settle and allow all of the same as the settled case herein.

Dated August 20, 1923.

By the Court.

C. W. Stanton, District Judge.

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#### IN DISTRICT COURT OF BELTRAMI COUNTY

#### NOTICE OF MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR A NEW TRIAL

To the above named plaintiff and Samuel A. Anderson, Esq., his attorney:

You will please take notice that at the District Court chambers in the court house in the city of Bemidji, county of Beltrami and State of Minnesota, on Monday the 20th day of August, 1923, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, defendant will move the court, the Honorable C. W. Stanton, judge thereof, to settle and allow the proposed settled case heretofore served herein, as the settled case in said action; and that immediately upon [fol. 740] the settling of said case and upon all the files, records and proceedings in said action judgment be ordered and entered in said action in favor of defendant, notwithstanding the verdict of the jury in favor of the plaintiff herein.

Said motion for judgment notwithstanding the verdict will be based upon each and all of the following grounds, to-wit:

1. That the evidence does not justify a verdict in favor of plaintiff, but conclusively shows that the verdict should have been in favor of defendant.
2. That the court should not have submitted to the jury any question of negligence on the part of defendant as the proximate cause or any part of the proximate cause, of plaintiff's injury.
3. That the court should not have permitted the reception of any evidence under the complaint for the reason that said complaint does

not state facts sufficient to constitute a cause of action under either the Federal Employers' Liability Act or under the Federal Safety Appliance Act, nor under any Federal Act.

4. That defendant was entitled to a directed verdict in its favor at the opening of the testimony, as moved for by defendant at said time; said motion being based upon the ground that no cause of action was, under the Federal Acts aforesaid, pleaded in the complaint or shown to be claimed under the opening statement of counsel.

5. That defendant was entitled to a dismissal of the action at the opening of the testimony, as moved for by defendant at said time; [fol. 741] said motion being based upon all of the reasons and grounds heretofore stated.

6. That defendant was entitled to a directed verdict in its favor at the close of the testimony, as moved for by defendant at said time; said motion being based upon each and all of the grounds then and there specified, to-wit:

First. That upon all the evidence and the law applicable thereto plaintiff is not entitled to recover.

Second. That the evidence wholly fails to establish any negligence or ground of liability on the part of the defendant which is, or could be, the proximate cause, or any part of the proximate cause, of plaintiff's injury.

Third. That the claimed breach of legal duty on the part of defendant with respect to the carrier iron referred to in the testimony is shown by the evidence not to have been the proximate cause of the plaintiff's injury.

Fourth. That the Federal Employers' Liability Act and the Federal Safety Appliance Acts are not, nor is either or any part of said acts, applicable to this case.

Fifth. That the Federal Employers' Liability Act and the Federal Safety Appliance Acts are not applicable to this case, for the reason that it is not shown that the carrier iron in question formed any part of the automatic coupler required by the Federal statute, nor was plaintiff at the time of his fall and injury in a position to be within the protection of said acts, nor was the alleged violation of the [fol. 742] Federal Appliance Act, under the circumstances disclosed, a proximate cause, or any part of the proximate cause of the plaintiff's injury.

Sixth. That the evidence conclusively shows that the sole proximate and moving cause of plaintiff's injury was losing his balance and falling from the bridge and that his fall and resulting injury were either accidental or arose solely from his own negligence and want of due care and that his injuries did not result, directly or proximately, from the alleged defect in the carrier iron or in any part of the coupling apparatus.

Seventh. That the evidence conclusively shows that the plaintiff assumed all risks incident to doing his work upon the bridge in the manner he did it and that his fall and resulting injury arose solely from the risk so assumed.

Eighth. That the evidence adduced in behalf of the plaintiff, taken in connection with all the other evidence in the case, is not of sufficient weight and cogency to warrant a finding by the jury in favor of the plaintiff, nor is it sufficient to warrant a finding by the jury that the accident occurred in the manner and from the cause detailed and described by the plaintiff.

Ninth. That the evidence adduced by the plaintiff, taken in connection with all of the evidence in the case, is not sufficient to constitute a preponderance of evidence in favor of a finding in his favor upon the issues of the case, nor that the accident occurred in the manner described by him and from the cause described by him.

[fol. 743] Tenth. That the evidence of the plaintiff is so vague and unsatisfactory that it is not sufficient, in the face of the other evidence in the case, to support a verdict for the plaintiff.

Eleventh. That the great preponderance of the evidence in the case shows that the accident could not have occurred in the way and manner described by the plaintiff and that the plaintiff has not a sufficient and fair preponderance of the evidence in an attempt to make out his case.

7. That the court erred in denying defendant's said motion for a directed verdict at said time.

You will further take notice that at said time and place and as a part of its said motion, defendant will move the said court that if its said motion for judgment notwithstanding the verdict be denied the court then make its order setting aside the verdict of the jury afore-said and granting a new trial upon the following grounds, to-wit:

1. The verdict is not justified by the evidence and is contrary to law.

2. Errors of law occurring at the trial, duly excepted to at the trial, and noted and preserved in the record and settled case herein.

3. Errors of law not excepted to at the trial, but hereby specifically assigned as follows, to-wit:

(a) The court erred in instructing the jury as follows:

"So it becomes necessary for me to call your attention to the Federal laws to which I have referred. We have a Federal law which is commonly referred to as the Safety Appliance Act applicable to [fol. 744] railway companies; it has application to railway companies or common carriers engaged in interstate commerce; and so, it being admitted that this train was engaged in interstate commerce, it has application in this case."

(b) The court erred in instructing the jury as follows:

"The law requiring couplers such as I have called your attention to and such as the law defines, makes it mandatory upon a railway company to provide such coupling devices upon all cars used in interstate commerce and its failure to do so would constitute negligence as a matter of law, and injury resulting from that negligence would render the railway company liable in damages.

(c) The court erred in instructing the jury as follows:

"Now, one of the questions of fact which I deem it proper to submit to you in this case is whether this particular car involved in this action, about which you have heard testimony, was equipped with this coupler as required by law."

(d) The court erred in instructing the jury as follows:

"I am submitting to you that question of fact to determine from all of the evidence in the case, whether the carrier iron referred to constituted a part of the coupling device and whether, in the condition in which it was, it rendered the coupling device defective, or, in other words, whether the carrier iron was a defective part of the coupling device."

[fol. 745] (e) The court erred in instructing the jury as follows:

"If you find that it was and that the condition of the carrier iron was such that it rendered the coupler inadequate to cause a coupling to be made automatically by impact and so that the cars could not be uncoupled without the necessity of men going between the ends of the cars, I say, if you find affirmatively upon that fact, then you would necessarily find that the defendant company was negligent in that regard, negligent in its failure to comply with the Safety Appliance Act, the particular language of which I have called to your attention."

(f) The court erred in instructing the jury as follows:

" \* \* \* the action brought by the plaintiff rests upon that claim, upon that allegation made by him that the defendant was negligent in that particular manner, that is, because of a defective coupler, and unless that is sustained by the evidence the plaintiff would not be entitled to recover and there is no other claim of defect in the coupler except that occasioned by the condition of the carrier iron or the manner in which it was attached to the car."

(g) The court erred in instructing the jury as follows:

"In other words, in order to base a finding of negligence against the defendant on the alleged defective condition of the carrier iron, you must find from a preponderance of the evidence that the carrier [fol. 746] iron was a part of the automatic coupler as defined or contemplated by the Federal Safety Appliance Act."

(i) The court erred in instructing the jury as follows:

"If the coupler in this case was defective, then, under the statutory law, the defendant was negligent and if the defendant was negligent it is liable for all the natural and proximate consequences of such negligence."

(l) The court erred in instructing the jury as follows:

"If you find that the defendant was negligent under the evidence and the instructions of the court, and that such negligence was the proximate cause of the injury, then it will be your duty to find a verdict for the plaintiff, without regard to the questions of contributory negligence or assumption of risk, because, under the Federal law, contributory negligence is not a defense in any case where the violation by the common carrier, the railway company, of any statute enacted for the safety of employes contributed to the injury of the employe; and the same rule applies to, the same form of statute covers, the claim of assumption of risk. And so for those reasons under the Federal law, it makes no difference in this case whether the plaintiff was himself negligent and therefore guilty of contributory negligence or whether the plaintiff did assume the risk of the work performed by him or attempted to be performed by him at the time. So you will disregard those two questions of contributory negligence and assumption of risk; and if you find that the defendant railway company was negligent and that such negligence was the proximate cause of the injury, you will find in some amount for the plaintiff."

(m) The court erred in instructing the jury as follows:

"If plaintiff was attempting to bring the draw bar back to its proper position so the coupling could be made at the time that the accident occurred, then the protection of the act to which I have called your attention extended to him while he was so engaged."

(n) The court erred in instructing the jury as follows

"It is immaterial in this case whether the car having the coupler which dropped and became uncoupled, if you so find the fact to be, was the property of the defendant or of some other person or corporation, for the reason that the law makes it unlawful to haul or use any car with a coupler not complying with the provisions of the act."

(o) The court erred in instructing the jury as follows:

"You are instructed that it is immaterial whether the defendant knew, or in the exercise of ordinary care should have known, of the condition of said coupler or carrier iron or the weakness or insufficiency of the said carrier iron or support, for the reason that the duty imposed upon the defendant by the statute in question is continuous and absolute and that the common law rule as to the exercise of ordinary care has no application."

[fol. 748] (p) The court erred in instructing the jury as follows:

"Gentlemen, I think of nothing further that I deem it necessary to call to your attention. I have endeavored to call to your attention the issues of fact and the rules and principles of law which I deem applicable. I wish you to bear in mind that, in order to find for the plaintiff in any amount, you must find negligence on the part of the defendant, your must find that such negligence was the proximate cause of the injury and unless you do so find, your verdict should be for the defendant.

You will bear in mind too, that you should give no consideration to the question of either contributory negligence or assumption of risk."

(q) The court erred in first instructing the jury that it would submit to the jury as a question of fact whether the carrier iron referred to in the testimony constituted a part of the automatic coupler and afterwards instructing the jury in effect that such carrier iron was, as a matter of law, a part of the automatic coupler, thereby creating in the minds of the jurors a state of doubt and confusion as to the law applicable to the case and the questions submitted to them for determination.

(r) The court erred in first instructing the jury that it would submit to the jury as a question of fact whether the car involved in this action was equipped with this coupler as required by law and afterwards instructing the jury to disregard all questions of contributory negligence and assumption of risk because under the [fol. 749] Federal law these are not a defense in any case where the Safety Appliance Act has been violated, in effect instructing the jury that the car was not provided with a coupler in accordance with law, thereby creating in the minds of the jurors a state of doubt and confusion as to the law applicable to the case and the question submitted to them for determination.

(s) The court erred in refusing to give to the jury the defendant's requested instruction numbered II.

(t) The court erred in refusing to give to the jury defendant's requested instruction numbered III.

(u) The court erred in refusing to give to the jury defendant's requested instruction numbered V.

(v) The court erred in refusing to give to the jury defendant's requested instruction numbered VI.

(w) The court erred in refusing to give to the jury defendant's requested instruction numbered X.

(x) The court erred in refusing to give to the jury defendant's requested instruction numbered XI.

(y) The court erred in refusing to give to the jury defendant's requested instruction numbered XVI.

(z) The court erred in refusing to give to the jury defendant's requested instruction numbered XVII.

[fol. 750] (aa) The court erred in refusing to give to the jury defendant's requested instruction numbered XVIII.

(bb) The court erred in refusing to give to the jury defendant's requested instruction numbered XIX.

(cc) The court erred in refusing to give to the jury defendant's requested instruction numbered XX.

(dd) The court erred in refusing to give to the jury defendant's requested instruction numbered XXI.

(ee) The court erred in refusing to give to the jury defendant's requested instruction numbered XXIII.

(ff) The court erred in refusing to admonish the jury, as requested by defendant's counsel, to disregard the statement of counsel for plaintiff during his argument to the jury to the effect that plaintiff would have a cause of action under the Federal Safety Appliance Act if, after he had made the coupling he had stepped backward away from the car for the purpose of having the train slack back to test the coupling, and had then fallen from the bridge.

4. Misconduct of the prevailing party by and through his counsel, to-wit:

(a) In making the following statement in his argument to the jury:

"\* \* \* they passed a law in 1893, going into effect at a later date so as to give the railroad companies time to comply with it, re-[fol. 751] quiring companies to have upon their cars couplers that would couple and uncouple automatically, without the necessity of the brakeman or employe going between the cars for the purpose of making such coupling or uncoupling or for the purpose of repairing and fixing a defective coupler so it would couple when the repairing is done by other than car repairmen. That is the purpose of the law. That law requires the railroad company to see to it at their peril that that coupler is always right; always right."

(b) In making the following statement in his argument to the jury:

"But there is another provision contained in the Employers' Liability Act applicable here. Before I mention that I want to tell you another thing: At common law there was another defense that the railroad companies had and we often called these the railroad companies and other corporations' favorite twins, contributory negligence and assumption of risk. Under the common law the railroad companies nursed those babies and fed them up on the kind of food counsel spoke of yesterday as too good——"

Mr. Palmer: Now, if your Honor please, I dislike to interrupt counsel, but I desire at this time to take exception to his discussion of this contributory negligence and assumption of risk and common law negligence and his statement to the jury that the company was guilty here of common law negligence for which it would be liable, and I desire that the jury be instructed or cautioned that they have [fol. 752] nothing to do with common law negligence, assumption of risk or contributory negligence in this case.

Mr. Anderson: That is the exception, is it?

The Court: The reporter will note the exception.

Mr. Anderson: I will go right on.

Mr. Palmer: I dislike to interrupt you, Mr. Anderson, but I feel constrained to do so.

Mr. Anderson: I accept your statement for what it is worth, but I will go on. I was speaking about the railroads' twin babies and in order that counsel, for fear he hasn't got all the glue out of his mind yet, will understand what — am driving at, I want to illustrate the further provision of the Employers' Liability Act and the reason why they wiped out these twin babies as defenses."

(c) In making the following statement in his argument to the jury:

"Counsel says it must appear in this case—let me get that; I don't want to quote this without being sure. Here is what counsel is talking about. 'If you find—' these you know are the defendant's requests. I didn't have any. Let's see how many they have got there; got about a half a dollar's worth of paper—twenty-three. Now, the court charges the jury; the court tells you what the law is, but the defendant, properly, within his rights, has put in twenty-three requests. Here is one of them, twelve: 'If you find from the evidence that the plaintiff fell from the bridge when the train was coupled together and not in motion—' that means coupling complete, coupling in shape so the train would go on its journey, air hose coupler up, air cut in, everything ready for what we call the highball go ahead or the highball back up,—then your verdict must be for the defendant.' Now, that instruction will be given you by the court. Well, that instruction means this,—nothing else—that instruction means if you find that Gonceau had succeeded in making a coupling of that train, finished making it, ready to go, not for the purpose of testing it if he stepped off, not at all to see whether it would work because that was part of the act of fixing the coupling up, testing it out, like the slackhead is testing it out, as counsel told you, all finished ready to go.

Mr. Palmer: Well, now, I except to that as an entirely erroneous statement of the principle of law embodied in the instruction.

The Court: Note the exception."

(d) In making the following statement in his argument to the jury:

"If we had alleged in this case and it had been the fact that he was pulling that defective draw bar over, but after fixing it, he

was pulling the good one over so they would meet in line, as he testified he did, and his hand slipped off, he would have a cause of action. Of course, he would because he was trying to fix up a coupler so it would couple. If he had made the coupling and had stepped outside for the purpose of slacking back and testing it, it is all a part of an attempt to make the coupling.

Mr. Palmer: I take an exception to that.

[fol. 754] Mr. Anderson: And we would have alleged it——

Mr. Palmer: Wait a moment. I take exception to that as an absolutely erroneous statement of the law and ask that the jury be instructed to wholly disregard it.

The Court: Note the exception, Mr. Reporter. I did not hear it plainly enough to make any statement with reference to it. Go on."

5. Excessive damages appearing to have been given under the influence of passion or prejudice.

Said motion and all thereof will be based upon the record in said cause, settled case, and all files, records and proceedings therein.

Dated August 9th, 1923.

Marshall A. Spooner, Bemidji, Minnesota; John E. Palmer,  
1427 First Natl. Soo Line Bldg., Minneapolis, Minnesota,  
Attorneys for Defendant.

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## IN DISTRICT COURT OF BELTRAMI COUNTY

### ORDER DENYING MOTION FOR JUDGMENT

Motion having been made by defendant in the alternative, for judgment in favor of defendant notwithstanding the verdict or for a new trial, and hearing upon said motion having been had at court chambers in the city of Bemidji, in said county, on the 20th day of August, 1923, Messrs, Marshall A. Spooner and John E. Palmer, attorneys for defendant, appearing in support thereof, and Mr. Samuel A. Anderson, Attorney for plaintiff, appearing in opposition.

[fol. 755] It is ordered that said motion be and the same is hereby, in all things, denied.

Stay of twenty (20) days ordered.

Dated August 20th, 1923.

By the Court:

C. W. Stanton, District Judge.

## IN DISTRICT COURT OF BELTRAMI COUNTY

## NOTICE OF APPEAL TO THE SUPREME COURT

To the above named plaintiff and to Samuel A. Anderson, Esq., his attorney, and to F. W. Rhoda, clerk of said District Court:

Please take notice, that the above named defendant, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, hereby appeals to the Supreme Court of the state of Minnesota, from the order of said District Court entered herein on the 20th day of August, 1923, wherein it is ordered that the motion of defendant for judgment notwithstanding the verdict be and the same is denied, and further ordering that defendant's motion for a new trial be and the same is denied, and from the whole thereof.

Dated this 11th day of September, 1923.

Marshall A. Spooner, Bemidji, Minnesota; John E. Palmer,  
1427 First Natl. Soo Bldg., Minneapolis, Minnesota, At-  
torneys for Defendant.

[fol. 756] Due and personal service of the within notice admitted this 12th day of September, 1923.

S. A. Anderson, Attorney for Plaintiff.

Due and personal service of the within notice admitted this 15th day of September, 1923.

F. W. Rhoda, Clerk of said District Court.

Waiver of appeal bond duly signed by S. A. Anderson filed with notice of appeal.

## IN SUPREME COURT OF MINNESOTA

## ASSIGNMENTS OF ERROR—Filed December 11, 1923

## I

The court erred in overruling defendant's demurrer to the amended complaint (13-17).

## II

The court erred in overruling defendant's objection to the receiving of any evidence under the complaint for the reason that it does not state facts sufficient to constitute a cause of action under the Federal Employers' Liability Act or the Federal Safety Appliance Act, or under any Federal act (62).

## III

The court erred in denying defendant's motion for a directed verdict made at the opening of the trial and upon the ground that

upon the pleadings and the opening statement of counsel for the plaintiff, no cause of action is pleaded in the amended complaint [fol. 757] or claimed by the opening statement of counsel for plaintiff under either the Federal Employers' Liability Act, the Federal Safety Appliance Act, or any other Federal act (63).

#### IV

The court erred in denying defendant's motion to dismiss the action made at the opening of the trial and upon the ground that the pleadings and the opening statement of counsel for plaintiff did not state a cause of action under the Federal Employers' Liability Act or under the Federal Safety Appliance Act or under any other Federal act (63, 64).

#### V

The court erred in overruling defendant's motion for a directed verdict made at the close of all the testimony (2005-2012).

#### VI

The court erred in overruling defendant's motion for a directed verdict made at the close of all the testimony and upon the ground that upon all of the evidence and the law applicable thereto, plaintiff is not entitled to recover (2006).

#### VII

The court erred in overruling defendant's motion for a directed verdict made at the close of all of the testimony upon the ground that the evidence wholly fails to establish any negligence or ground [fol. 758] of liability on the part of the defendant which is or could be the proximate cause or any part of the proximate cause of plaintiff's injury (2006).

#### VIII

The court erred in overruling defendant's motion for a directed verdict made at the close of all of the testimony and upon the ground that the claimed breach of legal duty on the part of the defendant with respect to the carrier iron referred to in the testimony is shown by the evidence not to have been the proximate cause or any part of the proximate cause of the plaintiff's injury (2007).

#### IX

The court erred in overruling defendant's motion for a directed verdict made at the close of all of the testimony and upon the ground that the Federal Employers' Liability Act and the Federal Safety Appliance Act are not, nor is either or any part of said acts, applicable to this case (2007).

## X

The court erred in overruling defendant's motion for a directed verdict, made at the close of all of the testimony and upon the ground that the Federal Employers' Liability Act and the Federal Safety Appliance Acts are not applicable to this case, for the reason that it is not shown that the carrier iron in question formed any part of the automatic coupler required by the Federal Statute, nor [fol. 759] was plaintiff at the time of his fall and injury in a position to be within the protection of said acts, nor was the alleged violation of the Federal Safety Appliance Act, under the circumstances disclosed a proximate cause, or any part of the proximate cause of the plaintiff's injury (2008).

## XI

The court erred in denying the defendant's motion for a directed verdict, made at the close of the testimony and upon the ground that the evidence conclusively shows that the sole proximate and moving cause of plaintiff's injury was losing his balance and falling from the bridge and that his fall and resulting injury were either accidental or arose solely from his own negligence and want of due care and that his injuries did not result, directly or proximately, from the alleged defect in the carrier iron or in any part of the coupling apparatus (2009).

## XII

The court erred in denying defendant's motion for a directed verdict made at the close of all of the testimony and upon the ground that the evidence conclusively shows that the plaintiff assumed all risks incident to doing his work upon the bridge in the manner he did it, and that his fall and resulting injury arose solely from the risk so assumed (2009).

## XIII

The court erred in denying defendant's motion for a directed [fol. 760] verdict made at the close of all of the testimony and upon the ground that the evidence adduced in behalf of the plaintiff, taken in connection with all the other evidence in the case is not of sufficient weight and cogency to warrant a finding by the jury in favor of the plaintiff, nor is it sufficient to warrant a finding by the jury that the accident occurred in the manner and from the cause detailed and described by the plaintiff (2010).

## XIV

The court erred in denying defendant's motion for a directed verdict made at the close of all of the testimony and upon the ground that the evidence adduced by the plaintiff, taken in connection with all of the evidence in the case, is not sufficient to constitute a pre-

ponderance of evidence in favor of a finding in his favor upon the issues of the case, nor that the accident occurred in the manner described by him and from the cause described by him (2011).

### XV

The court erred in denying defendant's motion for a directed verdict made at the close of all of the testimony and upon the ground that the evidence of the plaintiff is so vague and unsatisfactory that it is not sufficient, in the face of the other evidence in the case, to support a verdict for the plaintiff (2011).

[fol. 761]

### XVI

The court erred in denying defendant's motion for a directed verdict made at the close of all of the testimony and upon the ground that the great preponderance of the evidence in the case shows that the accident could not have occurred in the way and manner described by the plaintiff and that the plaintiff has not a sufficient and fair preponderance of the evidence in an attempt to make out his case (2012).

### XVII

The court erred in refusing to admonish the jury to disregard the statement of counsel for plaintiff during his argument to the jury to the effect that the defendant was guilty of common law negligence for which it would be liable aside from the Federal acts and in failing to then instruct the jury that they had nothing to do with common law negligence as was then requested by defendant (2037).

### XVIII

The court erred in refusing to admonish the jury to disregard the statement of counsel for plaintiff during his argument to the jury to the effect that the vital instruction, to-wit: that if the jury found that the plaintiff fell from the bridge when the train was coupled together and not in motion they should find for the defendant, meant that Goneau must have finished making the coupling ready to go and not the giving of a signal for the purpose of slacking ahead to test the coupling (2037-2068).

[fol. 762]

### XIX

The court erred in refusing to admonish the jury to disregard the statement of counsel for plaintiff during his argument to the jury to the effect that if Goneau had made the coupling and had stepped outside for the purpose of giving a signal for slacking back and testing it, such stepping away from the train would be a part of the attempted coupling and within the protection of the act (2073).

## XX

The court erred in instructing the jury as follows:

"So it becomes necessary for me to call your attention to the Federal laws to which I have referred. We have a Federal law which is commonly referred to as the Safety Appliance Act applicable to railway companies; it has application to railway companies or common carriers engaged in interstate commerce; and so, it being admitted that this train was engaged in interstate commerce, it has application in this case" (2229).

## XXI

The court erred in instructing the jury as follows:

"The law requiring couplers such as I have called your attention to and such as the law defines, makes it mandatory upon a railway company to provide such coupling devices upon all cars used in interstate commerce and its failure to do so would constitute negligence as a matter of law, and injury resulting from that negligence [fol. 763] would render the railway company liable in damages" (2230).

## XXII

The court erred in instructing the jury as follows:

"Now, one of the questions of fact which I deem it proper to submit to you in this case is whether this particular car involved in this action, about which you have heard testimony, was equipped with this coupler as required by law" (2231).

## XXIII

The court erred in instructing the jury as follows:

"I am submitting to you that question of fact to determine from all of the evidence in this case, whether the carrier iron referred to constituted a part of the coupling device and whether, in the condition in which it was, it rendered the coupling device defective, or, in other words, whether the carrier iron was a defective part of the coupling device" (2232).

## XXIV

The court erred in instructing the jury as follows:

"If you find that it was and that the condition of the carrier iron was such that it rendered the coupler inadequate to cause a coupling to be made automatically by impact and so that the cars could not be uncoupled without the necessity of men going between the ends of the cars, I say, if you find affirmatively upon that fact, then you [fol. 764] would necessarily find that the defendant company was

negligent in that regard, negligent in its failure to comply with the Safety Appliance Act, the particular language of which I have called to your attention" (2233).

## XXV

The court erred in instructing the jury as follows:

"\* \* \* \* The action brought by the plaintiff rests upon that claim, upon that allegation made by him that the defendant was negligent in that particular manner, that is, because of a defective coupler and unless that is sustained by the evidence the plaintiff would not be entitled to recover and there is no other claim of defect in the coupler except that occasioned by the condition of the carrier iron or the manner in which it was attached to the car" (2234).

## XXVI

The court erred in instructing the jury as follows:

"In other words, in order to base a finding of negligence against the defendant on the alleged defective condition of the carrier iron, you must find from a preponderance of the evidence that the carrier iron was a part of the automatic coupler as defined or contemplated by the Federal Safety Appliance Act" (2235).

## XXVII

The court erred in instructing the jury as follows:

[fol. 765] "If the coupler in this case was defective, then, under the statutory law, the defendant was negligent and if the defendant was negligent it is liable for all the natural and proximate consequences of such negligence" (2236).

## XXVIII

The court erred in instructing the jury as follows:

"If you find that the defendant was negligent, under the evidence and the instructions of the court, and that such negligence was the proximate cause of the injury, then it will be your duty to find a verdict for the plaintiff, without regard to the questions of contributory negligence or assumption of risks, because under the Federal law, contributory negligence is not a defense in any case where the violation by the common carrier, the railway company, of any statute enacted for the safety of employes contributed to the injury of the employe; and the same rule applies to, the same form of statute covers, the claim of assumption of risk. And so for those reasons under the Federal law, it makes no difference in this case whether the plaintiff was himself negligent and therefore guilty of contributory negligence or whether the plaintiff did assume the

risk of the work performed by him or attempted to be performed by him at the time. So you will disregard those two questions of contributory negligence and assumption of risk; and if you find that the defendant railway company was negligent and that such negligence was the proximate cause of the injury, you will find in some amount for the plaintiff" (2237).

[fol. 766]

## XXIX

The court erred in instructing the jury as follows:

"If plaintiff was attempting to bring the draw bar back to its proper position so the coupling could be made at the time that the accident occurred, then the protection of the act to which I have called your attention extended to him while he was so engaged" (2239).

## XXX

The court erred in instructing the jury as follows:

"It is immaterial in this case whether the car having the coupler which dropped and became uncoupled, if you so find the fact to be, was the property of the defendant or of some other person or corporation, for the reason that the law makes it unlawful to haul or use any car with a coupler not complying with the provisions of the act" (2240).

## XXXI

The court erred in instructing the jury as follows:

"You are instructed that it is immaterial whether the defendant knew, or in the exercise of ordinary care should have known, of the condition of said coupler or carrier iron or the weakness or insufficiency of the said carrier iron or support, for the reason that the duty imposed upon the defendant by the statute in question is continuous and absolute and that the common law rule as to the exercise of ordinary care has no application" (2241).

[fol. 767]

## XXXII

The court erred in instructing the jury as follows:

"Gentlemen, I think of nothing further that I deem it necessary to call to your attention. I have endeavored to call to your attention the issues of fact and the rules and principles of law which I deem applicable. I wish you to bear in mind that in order to find for the plaintiff in any amount, you must find negligence on the part of the defendant, you must find that such negligence was the proximate cause of the injury and unless you do so find, your verdict should be for the defendant.

You will bear in mind, too, that you should give no consideration to the questions of either contributory negligence or assumption of risk" (2242).

### XXXIII

The court erred in first instructing the jury that it would submit to the jury as a question of fact whether the carrier iron referred to in the testimony constituted a part of the automatic coupler and afterwards instructing the jury in effect that such carrier iron was, as a matter of law, a part of the automatic coupler, thereby creating in the minds of the jurors a state of doubt and confusion as to the law applicable to the case and the questions submitted to them for determination (2243).

### XXXIV

The court erred in first instructing the jury that it would submit to the jury as a question of fact whether the car involved in this [fol. 768] action was equipped with this coupler as required by law and afterwards instructing the jury to disregard all questions of contributory negligence and assumption of risk because under the Federal law these are not a defense in any case where the Safety Appliance Act has been violated, in effect instructing the jury that the car was not provided with a coupler in accordance with law, thereby creating in the minds of the jurors a state of doubt and confusion as to the law applicable to the case and the questions submitted to them for determination (2244).

### XXXV

The court erred in refusing to give to the jury the defendant's requested instruction numbered II (2193).

### XXXVI

The court erred in refusing to give to the jury defendant's requested instruction numbered III (2193).

### XXXVII

The court erred in refusing to give to the jury defendant's requested instruction numbered V (2194).

### XXXVIII

The court erred in refusing to give to the jury defendant's requested instruction numbered VI (2195).

[fol. 769]

### XXXIX

The court erred in refusing to give to the jury defendant's requested instruction numbered X (2196).

## XL

The court erred in refusing to give to the jury defendant's requested instruction numbered XI (2197).

## XLI

The court erred in refusing to give to the jury defendant's requested instruction numbered XVI (2198).

## XLII

The court erred in refusing to give to the jury defendant's requested instruction numbered XVII (2200).

## XLIII

The court erred in refusing to give to the jury defendant's requested instruction numbered XVIII (2202).

## XLIV

The court erred in refusing to give to the jury defendant's requested instruction numbered XIX (2202).

## XLV

The court erred in refusing to give to the jury defendant's requested instruction numbered XX (2203).

[fol. 770]

## XLVI

The court erred in refusing to give to the jury defendant's requested instruction numbered XXI (2204).

## XLVII

The court erred in refusing to give to the jury defendant's requested instruction numbered XXIII (2204).

## XLVIII

The court erred in denying defendant's motion for judgment notwithstanding the verdict based upon each and all of the grounds therein set forth (2217-2228).

## XLIX

The court erred in denying defendant's motion for a new trial based upon each and all of the grounds therein set forth (2228-2263).

## L

The verdict is not justified by the evidence.

## LI

The verdict is contrary to law.

## LII

The damages are excessive.

## LIII

There was misconduct on the part of plaintiff, acting by and through his counsel, in the following particulars:

[fol. 771] (a) In making the following statement in his argument to the jury:

"But there is another provision contained in the Employers' Liability Act applicable here. Before I mention that I want to tell you another thing: At common law there was another defense that the railroad companies had and we often called these the railroad companies and other corporations' favorite twins, contributory negligence and assumption of risk. Under the common law the railroad companies nursed those babies and fed them up on the kind of food counsel spoke of yesterday as too good—"

Mr. Palmer: Now, if your Honor please, I dislike to interrupt counsel, but I desire at this time to take exception to his discussion of this contributory negligence and assumption of risk and common law negligence and his statement to the jury that the company was guilty here of common law negligence for which it would be liable, and I desire that the jury be instructed or cautioned that they have nothing to do with common law negligence, assumption of risk or contributory negligence in this case.

Mr. Anderson: That is the exception, is it?

The Court: The reporter will note the exception.

Mr. Anderson: I will go right on.

Mr. Palmer: I dislike to interrupt you, Mr. Anderson, but I feel constrained to do so.

Mr. Anderson: I accept your statement for what it is worth, but I will go on. I was speaking about the railroads' twin babies and in order that counsel, for fear he hasn't got all the glue out of his [fol. 772] mind yet, will understand what I am driving at, I want to illustrate the further provision of the Employers' Liability Act and the reason why they wiped out these twin babies as defenses" (2036-2039).

(b) In making the following statement in his argument to the jury:

"Counsel says it must appear in this case—let me get that; I don't want to quote this without being sure. Here is what counsel is talking about. 'If you find—' these you know are the defendant's requests. I didn't have any. Let's see how many they have got there; got about half a dollar's worth of paper—twenty-three. Now, the court charges the jury; the court tells you what the law is, but

the defendant, properly, within his rights, has put in twenty-three requests. Here is one of them, twelve: 'If you find from the evidence that the plaintiff fell from the bridge when the train was coupled together and not in motion—that means coupling complete, coupling in shape so the train would go on its journey, air hose coupled up, air cut in, everything ready for what we call the highball go ahead or the highball back up,—then your verdict must be for the defendant.' Now, that instruction will be given you by the court. Well, that instruction means this,—nothing else—that instruction means if you find that Goncau had succeeded in making a coupling of that train, finished making it, ready to go, not for the purpose of testing it if he stepped off, not at all to see whether it would work because that was part of the act of fixing the coupling up, testing it out, like the slack-ahead is testing it out, as counsel told you, all finished ready to go.

Mr. Palmer: Well, now, I except to that as an entirely erroneous [fol. 773] statement of the principle of law embodied in the instruction.

The Court: Note the exception (2065-2068).

(c) In making the following statement in his argument to the jury:

"If we had alleged in this case and it had been the fact that he was pulling that defective drawbar over, but after fixing it, he was pulling the good one over so they would meet in a line, as he testified he did, and his hand slipped off, he would have a cause of action. Of course, he would because he was trying to fix up a coupler so it would couple. If he had made the coupling and had stepped outside for the purpose of slacking back and testing it, it is all a part of an attempt to make the coupling.

Mr. Palmer: I take an exception to that.

Mr. Anderson: And we would have alleged it —

Mr. Palmer: Wait a moment. I take exception to that as an absolutely erroneous statement of the law and ask that the jury be instructed to wholly disregard it.

The Court: Note the exception, Mr. Reporter.

I did not hear it plainly enough to make any statement with reference to it. Go on" (2072-2073).

[File endorsement omitted.]

[File endorsement omitted]

[fol. 774]

IN SUPREME COURT OF MINNESOTA

23810

ERNEST J. GONEAU, Respondent,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,  
Appellant

OPINION—Filed April 4, 1924

Syllabus

HOLT, J.:

In actions predicated upon Acts of Congress the rule of the law of the case will not be applied if, since the former decision, the Supreme Court of the United States has expressed an opinion contrary to such decision.

There being nothing inconsistent in *Davis v. Wolfe*, decided by the Supreme Court of the United States since the opinion in the former appeal herein was filed and relied on as precluding a recovery, the law of the case as announced in our former opinion should be applied, and accordingly the question whether the defective coupler was the proximate cause of plaintiff's injury was properly left to the jury.

There was no error during the trial or in the manner in which [fol. 775] the issues were submitted.

The charge of misconduct of counsel is not sustained.

The damages are not so large as to warrant interference by this court.

Affirmed.

#### OPINION

Defendant appeals from the order denying its motion in the alternative for judgment notwithstanding the verdict or a new trial.

On a former appeal (154 Minn. 1) defendant's right to judgment upon a record substantially like the present was denied. This is conceded to be the law of the case now, unless the Federal Supreme Court has in the meantime expressed an opinion that is out of harmony therewith. For that court is the final authority involving the application of the Acts of Congress upon which this action is predicated, and our duty is to follow its rulings even to disregarding the law of the case, which, after all, is only a rule of practice. *Sands v. Am. Ry. Express Co.*, filed April 4, 1924. Defendant claims that since our former decision the Supreme Court of the United States, in *Davis v. Wolfe*, filed November 12, 1923, has clearly announced a principle under which defendant is entitled to judgment even though plaintiff was injured in the manner testified to by him. We think not.

In order to determine whether the decision referred to rules this case, the facts disclosed by the record must be kept in mind. They [fol. 776] are not at all similar to those in the Wolfe case, and appellant does not so claim, but relies on the principle therein stated which is asserted to take plaintiff herein out of the protection of the Safety Appliance Act. It is undisputed that in the string of seventy cars, being hauled in interstate commerce toward Superior, Wisconsin, there was one so out of repair that, after leaving the station of Gordon, it disengaged from the coupler of the car behind, releasing the air and thereby causing an emergency stop of both parts of the train. When this occurred the rear end of this car stood about twenty feet east of the west end of the bridge crossing the St. Croix river and about the same distance ahead of the rear portion of the train. The accident happened after dark on October 27, 1920, a rainy and snowy evening. As was his duty, plaintiff, the rear brakeman went forward from the caboose to ascertain the cause of the mishap, and to restore normal conditions. He found the break and discovered that it was due to lack of bolts in the coupler, or drawbar carrier iron, one end of which was wholly unfastened, the burr on the single bolt holding it having worked off. This let the drawbar down so that the coupler slid out of the knuckle of the car behind. The carrier iron is unquestionably a part of the coupling device. If it is displaced, the drawbar with coupler drops down and disengages from the coupler of a car in good order, or cannot be coupled thereto. A passenger train was due at Gordon in a short time, and it was up to the crew of this [fol. 777] freight train to get it out of the way. Plaintiff's duty was to couple up the parted train, and that speedily. To that end emergency repairs must be made so that the defective coupler would receive or fit into the one from which it parted. Plaintiff had no burr that could be used, so undertook to put shims between the coupler and carrier iron after it had been pulled in place. The train was then coupled together, but within a few feet it parted the same as before. Plaintiff again attempted to put the coupler in condition to couple. In so doing he claims that he put his knee or leg under the coupler to lift it in position and, at the same time, took hold of the carrier iron, the free end of which had swung in under the car, due to the pressure of the heavy coupler or drawbar, and gave a hard pull to get it back in place. It gave way suddenly. Plaintiff lost his balance, fell off the bridge to the ground, some thirty feet below, and was injured.

Defendant contends that plaintiff was not engaged in a coupling operation when he met with his injury, but was repairing the car and exactly in the same position as a repair man if the car had stood upon a repair track in some yard of defendant's; that the train was at rest and there could be no attempt to use the coupler until after it had been repaired; and therefore the defective coupler as a matter of law could not be the proximate cause of the injury any more than in the cases of *St. Louis & San Francisco Ry. Co. v. Conarty*, 238 U. S. 243, and *Lang v. New York Central Ry. Co.*, 255 [fol. 778] U. S. 455, where it was so held. In those cases there was

a collision with a bad order car with drawbar and coupler gone. It was not intended to couple onto or move the bad order car, but by mischance the car in one case and the locomotive in the other, upon which the employee rode, bumped into the bad order car and crushed him. Had the drawbar and couple been present the person of the employee could not have been harmed, for he was in a safe place if a car equipped with a coupler, such as the law requires, had been bumped into. But here there was an intention to couple onto the defective car. It was imperative to move it immediately. Plaintiff had to prepare the coupler so it would couple with the other car. He was not a repair man. Emergency repairs which, at times, he as brakeman was called to do in order to couple up trains that break in two in transit should not place him in the class of ordinary repair men doing their work with proper tools, appliances and protection. Here the defective coupler caused plaintiff to go between the cars and attempt to put it in condition to couple, and in that attempt he was injured. Under the circumstances he was actually engaged in a coupling operation. It is appropriate to refer to the former opinion and this statement therein: "It matters little whether he was attempting to make the coupling or right the position of the drawbar so that the coupling could be made automatically by impact. In either case the chain of events extended uninterruptedly from the defective appliance to the injury, and [fol. 779] there was the direct causal relation which the law requires."

It seems to us the facts here bring the case more in line with *Louisville Railroad Co. v. Layton*, 243 U. S. 617, and *Minnesota Railroad Co. v. Gotschall*, 244 U. S. 66 which as said in *Davis v. Wolfe*, *supra*, authorize a recovery "if the failure to comply with the requirements of the act (Safety Appliance Act) is a proximate cause of the accident, resulting in an injury to him (the employee) while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specially designed to furnish him protection." *M'Calmont v. Pennsylvania Ry. Co.*, 283 Fed. 736; and *McNaney v. Chicago, Etc., Ry. Co.*, 132 Minn. 391 are there cited with approval. Defendant points to the *M'Calmont* case as identical with the present. But *M'Calmont* was not injured while or because of making an emergency repair for the purpose of then moving the car. He went in between cars in a bad order yard to shorten a chain, by which, for lack of a drawbar and coupler, they were united. No hauling of those cars was in progress or in immediate contemplation. While he was adjusting the chain another train bumped against the cars and the injury resulted. The court held the defective coupler the condition and not the cause of the injury and hence a recovery was denied. It seems to us that in the instant case the defective coupler may be said to be the cause, for the very attempt to prepare it for immediate coupling up and movement of the train directly caused plaintiff's fall. It also may be said that the court more confidently placed its [fol. 780] denial of recovery upon *M'Calmont's* disobedience of orders as being the sole proximate cause of his misfortune, citing *Great Northern Ry. Co. v. Wiles*, 240 U. S. 444.

In our opinion the facts of this case are more nearly akin to those in *Erie Ry. Co. v. Russell*, 183 Fed. 723, than any other to which attention has been drawn. Certiorari therein was denied (220 U. S. 607). This must be taken as an affirmation of the law as stated and applied by the Circuit Court of Appeals. There the car with the defective coupler was not being hauled. It was stopped temporarily for the insertion of a knuckle, but it was intended to couple it to other cars as soon as repaired. Russell was holding the knuckle in place with his back to three cars standing at some distance, while a fellow servant hunted for a pin that would fit. The standing cars, without any apparent cause, moved down upon Russell and crushed him. It was held that the trial court properly submitted to the jury the question whether the presence of the defective coupler was the proximate cause of the accident.

Defendant also cites *Phillips v. Pennsylvania Ry. Co.*, 283 Fed. 381, a two to one decision. There Phillips had repaired the bell on top of the locomotive, and when returning to the cab the steam dome popped as he passed over it causing him to fall. The popping of the steam dome was the sole and efficient cause of the injury, and was entirely disconnected with the repairing of the bell. *Davis v.* [fol. 781] *Hand*, 290 Fed. 73, has no application, as we see it, to the facts of the case at bar.

We still are of the opinion that if plaintiff's story was true, and the jury so found, the verdict finding the defective coupler the proximate cause of the injury was justified, and that nothing has been stated by the Supreme Court of the United States since our former decision to warrant us in disregarding the binding effect of that decision. That this was a defective coupler cannot be denied. It was rendered defective because the carrier iron was not properly attached. Unless this iron was securely fastened at both ends the coupler could not be kept in condition either to couple onto or stay coupled to another car. Instead of the eight bolts, securely affixed with burrs as designed, this carrier iron had left only one bolt and that several inches too long, by which it hung to the car when plaintiff undertook to make the coupling of the parted train. Surely this was a clear violation of the act, and no error of which defendant may complain was made by leaving the jury to find whether or not the carrier iron was a part of the coupler. Without that iron the coupler fell below the standard height which the law requires. We think the car should be considered, as a matter of law, to have had a defective coupler.

The additional evidence at this trial left the same questions for the jury as upon the former trial. The charge was full and accurate. Appellant's request, made during the plaintiff's argument to the jury that the court instruct the jury that the issues of contributory negligence and assumption of risk were not in the case, was complied with.

We find no merit in the claimed misconduct of counsel of the prevailing party. The argument to the jury is in part included in the settled case. It is forceful, but it is not pointed out wherein it de-

parts from the evidence, or wilfully misinterprets requests which the court had indicated would be given the jury.

The verdict is attacked as excessive. It is generous. But already there has been a loss of wages in a sum exceeding one-fourth of the verdict. The fall was such that serious injuries were likely. According to plaintiff's experts he will never again be able to perform manual labor. We cannot hold the verdict, approved by the learned trial court, so excessive as to indicate that the jury were actuated by passion or prejudice.

The order is affirmed.

#### IN SUPREME COURT OF MINNESOTA

#### STIPULATION FOR ENTERING JUDGMENT AFFIRMING ORDER—Filed April 10, 1924

It is hereby agreed and stipulated that the clerk of the above entitled court may forthwith enter judgment of affirmance in favor [fol. 783] of the above named respondent and against the above named appellant.

Dated April 7, 1924.

Samuel A. Anderson, Attorney for Respondent. Marshall  
A. Spooner and John E. Palmer, Attorneys for Appel-  
lant.

[File endorsement omitted.]

#### IN SUPREME COURT OF MINNESOTA

#### JUDGMENT—April 9, 1924

Pursuant to an order of court heretofore duly made and entered in this cause it is determined and adjudged that the order of the court below herein appealed from, to-wit, of the District Court within and for the county of Beltrami; be and the same hereby is in all things affirmed.

Dated and signed April 9th, A. D. 1924.

By the Court.

Attest:

Grace F. Kaercher, Clerk.

#### IN SUPREME COURT OF MINNESOTA

#### CLERK'S CERTIFICATE TO ENTRY OF JUDGMENT—Filed in Supreme Court April 9, 1924, in District Court April 10, 1924

I, Grace F. Kaercher, clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the entry of [fol. 784] judgment in the cause therein entitled, as appears from

the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at this capitol, in the city of St. Paul, April 9th, A. D. 1924.

Grace F. Kaercher, Clerk, (Signed) by Peter O. Scow,  
Deputy. (Supreme Court Seal.)

[File endorsement omitted.]

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IN SUPREME COURT OF MINNESOTA

MANDATE—Filed in District Court April 10, 1924

The State of Minnesota, to the Honorable Judge and officers of the District Court within and for the county of Beltrami:

Whereas, lately in your court, in an action therein pending, entitled Ernest J. Goneau, plaintiff and Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., defendant a certain order was entered therein August 20th, 1923, from which action of your court an appeal thereafter was taken to this court;

And whereas, the said cause came on to be heard before our [fol. 785] Supreme Court, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the order of the court below herein appealed from, be, and the same hereby is, in all things affirmed, and that judgment be entered accordingly. A copy of the entry of judgment thereupon in this court is herewith transmitted and made a part of this remittitur.

Now, therefore, this mandate is to you directed and certified to inform you of these proceedings had in our Supreme Court, in said hereinbefore mentioned cause, and the same is hereby and herewith remanded to your court for such or further record and proceedings therein as may be by law necessary, just and proper, under and by virtue of the said order herein made.

Witness, the Honorable Samuel B. Wilson, Chief Justice of the Supreme Court aforesaid, and the seal of said court at St. Paul, this 9th day of April, 1924.

Grace F. Kaercher, Clerk of the Supreme Court, (Signed)  
by Peter O. Scow, Deputy. (Supreme Court Seal.)

[File endorsement omitted.]

[fol. 786] IN DISTRICT COURT OF BELTRAMI COUNTY

STIPULATION AS TO COSTS, DISBURSEMENTS AND ENTRY OF JUDGMENT—Filed April 11, 1924

It is hereby agreed and stipulated by and between the parties above named through their attorneys respectively that the clerk of the above entitled court may enter forthwith judgment in favor of the above named plaintiff and against the above named defendant and upon the verdict rendered for plaintiff in said action and as soon as a remittitur has been received from the Supreme Court and filed in the office of the clerk of the above entitled court, and that the amount of said judgment shall be in the sum of twenty thousand six hundred fifty-eight and 78/100 (\$20,658.78) dollars.

It is further agreed and understood between said parties that in the above entitled action the defendant has taken two appeals; that on the first appeal the defendant obtained a reversal on certain errors; that the defendant then and there became entitled to and in fact entered judgment in the Supreme Court for costs and disbursements on said first appeal in favor of the defendant and against the plaintiff in the sum of seven hundred twenty-seven and 50/100 (\$727.50) dollars, with interest to date, and that said amount has been and is deducted from the total amount of the second verdict [fol. 787] and interest costs and disbursements in making up the above named amount for which judgment is to be entered and that in case the defendant fails to obtain a reversal in the Supreme Court of the United States said judgment for costs and disbursements in the Supreme Court, with interest, amounting to said sum of seven hundred twenty-seven and 50/100 (\$727.50) dollars, shall be treated and considered as having been paid and satisfied.

It is further agreed and understood between the parties hereto that in connection with the motion for judgment notwithstanding the verdict or for a new trial presented by defendant preliminary to said first appeal the defendant expended for the transcript the further sum of three hundred seventy-eight and 12/100 (\$378.12) dollars and that said amount has also been deducted from the total amount of the verdict, interest, costs and disbursements to which the plaintiff is entitled and in making up the amount above stated and stipulated as the amount of the judgment to be entered and that said amount is to be considered as paid by the plaintiff and satisfied in case the defendant finally fails in obtaining a reversal of said judgment so to be entered.

Nothing herein shall be construed as a stipulation or consent by defendant to entry of judgment so as to preclude appeal therefrom or petition to the Federal Supreme Court for writ of certiorari to review judgment entered herein in the Supreme Court of Minnesota. [fol. 788] Dated April 8, 1924.

(Signed) Samuel A. Anderson, Attorney for Plaintiff.  
Marshall A. Spooner and John E. Palmer, Attorneys for Defendant.

[File endorsement omitted.]

## IN DISTRICT COURT OF BELTRAMI COUNTY

JUDGMENT—April 11th, 1924

The above entitled action, having been regularly placed upon the calendar of the above named court for the February, 1923, general term thereof, came on for trial before the court and a jury duly impanelled and sworn to try the same, on the 26th day of February, 1923, which said jury did on the 3rd day of March, 1923, duly render a verdict therein in favor of the plaintiff in the sum of twenty thousand and no/100 dollars.

And thereafter said court, having made and filed its order herein denying defendant's motion for judgment notwithstanding the verdict or a new trial, said cause was appealed to the Supreme Court of the state of Minnesota, and thereafter and on the 10th day of April, 1924, said Supreme Court duly filed herein its mandate in all things affirming the order so appealed from.

[fol. 789] Now, pursuant to said verdict and mandate and on motion of Samuel A. Anderson, Esquire, attorney for plaintiff,

It is hereby adjudged that plaintiff do have and recover of the defendant the sum of twenty thousand and no/100 dollars, the amount of said verdict; together with the sum of six hundred fifty-eight and 78/100 dollars interest, costs and disbursements taxed and allowed herein, in accordance with stipulation and agreement of the parties filed herein as to said amount; in all in the sum of twenty thousand six hundred fifty-eight and 78/100 dollars.

By the Court,

F. W. Rhoda, Clerk of said District Court, by Lucy M. La Fontisee, Deputy. (Seal.)

[File endorsement omitted.]

## IN DISTRICT COURT OF BELTRAMI COUNTY

## NOTICE OF APPEAL

To the above named plaintiff and to Samuel A. Anderson, Esquire, his attorney and to F. W. Rhoda, clerk of said District Court:

Please take notice, that the above named defendant, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, hereby appeals to the Supreme Court of the state of Minnesota from the judgment entered [fol. 790] and docketed in the above entitled action on April 11th, 1924, in favor of plaintiff and against defendant. In connection with said appeal, said defendant makes the attached assignments of error, which it avers occurred in the entry of said judgment and in the proceedings prior thereto, and upon which defendant will rely for a reversal of said judgment in addition to all other assignments of error shown by the record herein.

Dated this 15th day of April, 1924.

Marshall A. Spooner, Bemidji, Minnesota, John E. Palmer, 1427 First Nat'l-Soo Bldg., Minneapolis, Minnesota. Attorneys for Defendant.

IN DISTRICT COURT OF BELTRAMI COUNTY  
ASSIGNMENTS OF ERROR—Filed April 19, 1924

Defendant, deeming itself aggrieved by the judgment in the above entitled action entered herein on the 11th day of April, 1924, in connection with its appeal to the Supreme Court of the state of Minnesota from said judgment does hereby assign the following errors, which errors it avers occurred in the entry of said judgment in said cause and in the proceedings prior thereto and upon which, in addition to all other assignments of error shown by the record herein, it relies for reversal upon this appeal:

[fol. 791]

I

The court erred in permitting recovery herein upon rights asserted under the Federal Employer's Liability Act, April 22, 1908, c. 149, 35 Stat. 65; as amended April 5, 1910, c. 143, 36 Stat. 291, in connection with the Federal Safety Appliance Acts, March 2, 1893, c. 196, 27 Stat. 531; April 1, 1895, c. 87, 29 Stat. 85; March 2, 1903, c. 697, 32 Stat. 943; April 14, 1910, c. 160, 36 Stat. 298.

II

The court erred in so construing the Federal Safety Appliance Act requiring interstate cars to be equipped with automatic couplers, as to make said act applicable to a fall from a bridge claimed by plaintiff to have been sustained by reason of losing his balance while doing repair work upon a standing and motionless car, such fall not being occasioned by any car movement nor by any contact with other cars nor by any use or attempted use of the alleged defective car or the coupling apparatus thereon.

III

The court erred in so construing the Federal Safety Appliance Act as to make the mere possession, with no attempt at present use, of a car with the drawbar sagging down on account of a nut coming off a bolt holding up a carrier iron, a violation of said act.

IV

[fol. 792] The court erred in holding that the alleged defective condition of the carrier iron which supported the drawbar was the proximate cause of plaintiff's fall and injury; when such alleged defective condition was in fact a mere incidental condition or situation presenting the occasion for plaintiff being where he was in making repairs upon a car not in present use.

## V

The court erred in holding that the benefits of the Federal Safety Appliance Act relating to couplers coupling automatically by impact extend to an employe who is merely putting a coupling in condition for use, which use is distinctly of the future and not of the present.

## VI

The court erred in holding that separation of the couplers by reason of the dropping of the drawbar was the proximate cause of plaintiff's fall from a bridge occurring sometime after the cars had come to rest; plaintiff's only claim being that his fall was occasioned solely by his loss of balance while doing repair work and not by any movement of the cars or action of the couplers or any attempted use of the defective car.

## VII

The court erred in holding that a fall from a bridge caused by loss of balance while making repairs upon a defective carrier iron on a standing car is within the evils against which the Federal Safety Appliance Acts are directed.

[fol. 793]

## VIII

The court error in so construing the Federal Safety Appliance Act as to render nugatory the amendment of April 14th, 1910, Chap. 160, Sec. 4, which expressly permits the making on the spot of emergency repairs upon a car becoming defective while in use.

## IX

The court erred in holding that the Federal Safety Appliance Act requiring interstate cars to be equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars, applies to repair work upon a defective coupling apparatus on a standing and motionless car.

## X

The court erred in holding that a suspension of the use of the car after the defect arose and attempting to repair it before using it further constituted a violation of the Federal Safety Appliance Act.

## XI

The court erred in holding that a defective condition arising during the use of a car properly equipped with automatic couplers, without use or attempted use of the car after the defect arose, constituted a violation of the Federal Safety Appliance Act.

## XII

[fol. 794] The court erred in holding that plaintiff was engaged in a coupling operation at the time of his injury, when plaintiff's own claim as to the facts was that some time after the cars had come to rest after separating, and while he was pulling the carrier iron around into position preparatory to going on with further repairs to hold it in place, he lost his balance and fell from the bridge on which the car was then standing.

## XIII

The court erred in holding that mere intention to couple onto the car after the coupling apparatus had been repaired constituted the act of repairing a coupling operation.

## XIV

The court erred in overruling defendant's objection to the reception of any evidence under the complaint on the ground that it does not state facts sufficient to constitute a cause of action under the Federal Employers' Liability Act or the Federal Safety Appliance Act, or under any Federal act.

## XV

The court erred in denying defendant's motion for a direct verdict made at the opening of the trial and upon the ground that upon the pleadings and the opening statement of counsel for the plaintiff, no cause of action is pleaded in the amended complaint or claimed by the opening statement of counsel for plaintiff under either the [fol. 795] Federal Employers' Liability Act, the Federal Safety Appliance Act or any other Federal act.

## XVI

The court erred in denying defendant's motion for a directed verdict made at the close of all of the testimony and upon the ground that the claimed breach of legal duty on the part of the defendant with respect to the carrier iron referred to in the testimony is shown by the evidence not to have been the proximate cause or any part of the proximate cause of the plaintiff's injury.

## XVII

The court erred in denying the defendant's motion for a directed verdict, made at the close of the testimony on the ground that the evidence conclusively shows that the sole proximate and moving cause of plaintiff's injury was losing his balance and falling from the bridge and that his fall and resulting injury were either accidental or arose solely from his own negligence and want of due care and

that his injuries did not result, directly or proximately, from the alleged defect in the carrier iron or in any part of the coupling apparatus.

### XVIII

The court erred in denying defendant's motion for a directed verdict made at the close of all of the testimony and upon the ground that the evidence conclusively shows that the plaintiff assumed all [fol. 796] risks incident to doing his work upon the bridge in the manner he did it, and that his fall and resulting injury arose solely from the risk so assumed.

### XIX

The court erred in refusing to give to the jury defendant's requested instruction XVI which was as follows:

"The plaintiff's testimony shows that the portion of the car on which the carrier iron had become loose was but a short distance from the natural ground at the north end of the bridge. It was the duty of the plaintiff to repair the carrier iron and to do so in a reasonably safe manner and in a reasonably safe place and with due regard for his own safety. Unless you find from the testimony that there was some obstacle to his doing so it was plaintiff's duty, for his own safety, to signal the moving of such car to a place where the fall of which he complains would not have happened. As a matter of law, I charge you that if you find he could have readily signalled so as to move said car to a place of safety in order to perform the work on the car which he contemplated, it was his duty to see that the train was moved so that the car would be in a reasonably safe place to work, and if you find that he failed to take such precaution, his injuries are due entirely to his own negligence and you must find a verdict for the defendant."

### XX

[fol. 797] The court erred in denying defendant's motion for a directed verdict at the close of all the testimony on the ground that it appeared from the undisputed facts that plaintiff was guilty of negligence in not selecting a suitable place to do the work of repairing the defective carrier iron and chose to make such repair in a hazardous place; and that under the circumstances such negligence on his part was the sole and proximate cause of his fall and injury.

### XXI

The court erred in denying defendant's motion for judgment notwithstanding the verdict.

### XXII

The court erred in entering judgment in favor of plaintiff and against defendant.

Dated April 15th, 1924.

Marshall A. Spooner, Bemidji, Minnesota; John E. Palmer,  
Minneapolis, Minnesota, Attorneys for Defendant.

Due and personal service of the within is hereby admitted this 19th day of April, 1924.

F. W. Rhoda, Clerk of said District Court.

Due and personal service of the within is hereby admitted this 15th day of April, 1924.

Samuel A. Anderson, St. Paul, Minn., Attorney for Plaintiff.

[fol. 798] [File endorsement omitted.]

# IN DISTRICT COURT OF BELTRAMI COUNTY

## WAIVER OF APPEAL BOND—Filed April 19, 1924

Defendant in the above entitled action being desirous of appealing to the Supreme Court of Minnesota from the judgment entered in said action on the 11th day of April 1924, in favor of plaintiff and against defendant, in the sum of twenty thousand six hundred fifty-eight and 78/100 dollars; plaintiff herein does hereby specifically waive the giving of a bond by defendant on said appeal, and agrees that said appeal may be taken and all proceedings stayed and superseded in like manner as though a supersedeas bond were given as required by statute.

Dated April 11th, 1924.

Samuel A. Anderson, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 799]

# IN SUPREME COURT OF MINNESOTA

## STIPULATION RE SUBMISSION OF CAUSE ON PRINTED RECORD— April 29, 1924

It is hereby stipulated by and between the parties to the above entitled action that the appeal now pending herein in this court; same being an appeal by defendant from final judgment entered April 11, 1924, in the District Court of Beltrami county, Fifteenth Judicial District of Minnesota, in favor of plaintiff and against defendant in the sum of \$20,658.78; may be, and is hereby submitted to the Supreme Court of Minnesota for its decision, without argument, upon the printed record, briefs of the parties and other proceedings had and taken in that certain action entitled Ernest J. Gonceau, respondent v. Minneapolis, St. Paul & Sault Ste. Marie Railway Company, appellant, numbered 23810 upon the files and records of said Supreme Court and being an appeal in this same cause from the order of said District Court of Beltrami county denying defendant's alternative motion for judgment notwithstanding the verdict or a new trial.

It is further stipulated that the record of this cause need not be printed by defendant-appellant upon this appeal and that no briefs need be filed by either party; the printing of such record and the making and filing of such briefs being hereby expressly waived.

[fol. 800] It is further stipulated that if said judgment of said District Court be affirmed, there be no remittitur to said District Court; the purpose of this stipulation being that if said judgment be affirmed final judgment may be entered thereon in this court; but nothing herein shall be construed as a consent by defendant to the entry of any judgment against it or as a waiver of its assignments of error in the entry of any judgment; defendant expressly reserving and claiming the right to have all questions arising in the entry of said judgment and proceedings prior thereto reviewed by the Federal Supreme Court if said court shall grant a writ of certiorari upon defendant's petition therefor.

Dated April 25, 1924.

Samuel A. Anderson, Attorney for Respondent. Marshall Spooner, Bemidji, Minnesota; John A. Palmer, 1427 First Nat'l-Soo Bldg., Minneapolis, Minnesota, Attorneys for Appellant.

[File endorsement omitted.]

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[File endorsement omitted]

IN SUPREME COURT OF MINNESOTA

OPINION—Filed April 30, 1924

[fol. 801] Per CURIAM:

This is an appeal by defendant from the final judgment of the District Court of Beltrami county, entered upon a verdict in favor of plaintiff in an action to recover for personal injuries, which action is based wholly upon the Federal Employers' Liability Act in connection with the Federal Safety Appliance Acts relating to automatic couplers on interstate cars. The questions presented are those decided by this court on an appeal from an order denying defendant's motion for judgment notwithstanding the verdict or a new trial; which decision of this court affirming the order of the District Court was filed April 4th, 1924, and reported in ——— Minn. ———.

For the reasons stated in that opinion, the judgment entered in the District Court is hereby in all things affirmed.

The parties having stipulated that if the judgment be affirmed there be no remittitur to the District Court, the clerk will enter final judgment in this court in accordance with rule XX.

## IN SUPREME COURT OF MINNESOTA

## PETITION FOR STAY—Filed May 1, 1924

[fol. 802] To the Honorable the Supreme Court of the state of Minnesota:

Defendant and appellant in the above entitled action most respectfully represents:

That it feels itself aggrieved by the decision and order for judgment of this court herein affirming the judgment of the court below and ordering the entry of final judgment in this court.

That defendant and appellant does therefore desire in good faith to petition the Supreme Court of the United States for a writ of certiorari to review the final judgment of this court, when entered, and will use all due diligence to submit its petition and the record herein as soon as is reasonably possible

Wherefore, defendant and appellant prays the order of this court staying all proceedings herein during the pendency of its application and petition to the Supreme Court of the United States for a writ of certiorari.

Dated May 1st, 1924.

Minneapolis, St. Paul & Sault Ste. Marie Railway Company,  
Petitioner, by Marshall A. Spooner, Bemidji, Minnesota;  
John E. Palmer, 1427 First Nat'l-Soo Line Bldg., Min-  
neapolis, Minnesota, Its Attorneys.

[File endorsement omitted.]

[fol. 803] IN SUPREME COURT OF MINNESOTA

## ORDER STAYING FURTHER PROCEEDINGS—Filed May 1, 1924

Upon application of the defendant and appellant in the above entitled action:

It is ordered, that upon and after the entry of final judgment herein as directed by the court in its decision and order entered and filed on the 30th day of April, 1924; all proceedings herein and in the District Court of Beltrami county, Minnesota, including the issuance of any writ of execution out of either court, be, and hereby are, in all things stayed pending the petition for a writ of certiorari to the Supreme Court of the United States and proceedings had thereon.

Dated May 1st, 1924.

Andrew Holt, Associate Justice of the Supreme Court of the State of Minnesota.

[File endorsement omitted.]

## IN SUPREME COURT OF MINNESOTA

JUDGMENT—May 1, 1924

Pursuant to an order of court heretofore duly made and entered [fol. 804] in this cause it is determined and adjudged that the judgment of the court below, herein appealed from, to-wit, of the District Court within and for the county of Beltrami be and the same hereby is in all things affirmed.

And it is further determined and adjudged that respondent herein, do have and recover of appellant herein the sum and amount of twenty thousand seven hundred fifty-two and 58/100 dollars (\$20,752.58), in this cause in this court, and that execution may be issued for the enforcement thereof.

Dated and signed May 1st, A. D. 1924.

By the Court,

Attest.

Grace F. Kaercher, Clerk.

## STATEMENT FOR JUDGMENT

Statutory costs, \$25.00; amount of judgment, \$20,658.78; interest from April 11th, 1924, to May 1st, 1924, \$68.80; total, \$20,752.58.

## IN SUPREME COURT OF MINNESOTA

CLERK'S CERTIFICATE—Filed May 1, 1924

I, Grace F. Kaercher, clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared [fol. 805] the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, May 1st, A. D. 1924.

Grace F. Kaercher, Clerk, by Peter O. Scow, Deputy.

(Seal of Supreme Court of the State of Minnesota.)

[File endorsement omitted.]

## IN SUPREME COURT OF MINNESOTA

ERNEST J. GONEAU, Respondent,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,  
Appellant.

## CLERK'S CERTIFICATE

I, Grace F. Kaercher, clerk of the Supreme Court of the State of Minnesota, do hereby certify that the foregoing, consisting of 805 numbered pages, is a true, correct and complete transcript of the record in the above entitled cause on two appeals to this court comprising the complete record on appeal from an order denying judgment notwithstanding the verdict or a new trial, and on appeal from judgment entered in the District Court of Beltrami county, Fifteenth [fol. 806] Judicial District of Minnesota; and of all the proceedings had and taken in this court, the opinion of the court in each thereof, together with the final judgment of this court entered on appeal from the judgment of said District Court.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Supreme Court at my office in the city of St. Paul, Minnesota, this 23rd day of May, A. D. 1924.

Grace F. Kaercher, Clerk of the Supreme Court of the State of Minnesota.

(Seal of the Supreme Court of the state of Minnesota.)

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[fol. 807] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING PETITION FOR CERTIORARI—Filed June 9, 1924

On petition for writ of certiorari to the Supreme Court of the State of Minnesota.

On consideration of the petition for a writ of certiorari herein to the Supreme Court of the State of Minnesota, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

(5580)

10

FILED  
MAY 23 1924  
WM. R. STANSBURY  
CLERK

**Supreme Court of the United States.**

OCTOBER TERM, 1923 1925

No. 41876

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY  
COMPANY, *Petitioner,*

VERSUS

ERNEST J. GONEAU, *Respondent.*

PETITION UNDER PROVISIONS OF SECTION 237 OF  
THE JUDICIAL CODE AS AMENDED BY THE ACT  
OF SEPTEMBER 6, 1916 (39 STAT. AT L., 726),  
FOR WRIT OF CERTIORARI TO THE SUPREME  
COURT OF MINNESOTA AND BRIEF IN SUPPORT  
THEREOF.

MARSHALL A. SPOONER,  
*Bemidji, Minnesota,*  
JOHN E. PALMER,  
*1427 First National Soo Line Bldg.,*  
*Minneapolis, Minnesota,*  
*Attorneys for Petitioner.*

# Supreme Court of the United States.

OCTOBER TERM, 1923.

No.....

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MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY  
COMPANY, *Petitioner,*

VERSUS

ERNEST J. GONEAU, *Respondent.*

---

**PETITION UNDER PROVISIONS OF SECTION 237 OF  
THE JUDICIAL CODE AS AMENDED BY THE ACT  
OF SEPTEMBER 6, 1916 (39 STAT. AT L., 726),  
FOR WRIT OF CERTIORARI TO THE SUPREME  
COURT OF MINNESOTA AND BRIEF IN SUPPORT  
THEREOF.**

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## PETITION.

*To the Honorable the Supreme Court of the United  
States:*

Now comes the Minneapolis, St. Paul & Sault Ste.  
Marie Railway Company, petitioner, respectfully rep-  
resenting that it is aggrieved by a final judgment of the  
Supreme Court of the state of Minnesota, entered on

the 1st day of May, 1924, in a certain cause therein pending wherein Ernest J. Goneau was plaintiff and respondent and wherein your petitioner Minneapolis, St. Paul & Sault Ste. Marie Railway Company was defendant and appellant, said cause being No. 23810 on the January, 1923, term of said court, and No. 24170 on the January, 1924, term of said court. That the matters at issue in said cause are wholly of a federal nature and are of peculiar gravity and importance in that said suit is to recover compensation under the Employer's Liability Act of Congress of April 22, 1908 (35 Stat. L., 65) and acts amendatory thereof, in connection with the Safety Appliance Acts of Congress of March 2, 1893 (27 Stat. L., 531) and acts amendatory thereof, for personal injuries alleged to have been sustained by said plaintiff while in the employ of petitioner as a brakeman on an interstate freight train. That plaintiff claims to have sustained said injuries by losing his balance and falling off a bridge while engaged in repairing a carrier iron, the function of which carrier iron was to hold up the drawbar of a box car at the end of which drawbar was an automatic coupler. Plaintiff testified that a nut had come off a bolt which held up one end of said carrier iron, thereby permitting the drawbar to sag sufficiently to uncouple the car from the car next to it; that the two cars were standing some distance apart on a bridge; that he found the carrier iron swung around under the drawbar and nearly parallel thereto; that he drew the carrier iron back into place and sufficiently re-

paired the defect so that he brought the cars together and made the coupling; that he then caused the train to be backed up but that after backing some distance the cars again parted at the defective point. Plaintiff says he again went to the place of the defect and found the cars standing some distance apart but still upon the bridge; that he again found the carrier iron swung around under the drawbar and nearly parallel thereto; that he attempted to again pull it around into proper position at right angles with the drawbar but that it seemed to stick, that he then braced himself for a harder pull at the same time raising up on the drawbar with his knee, whereupon the carrier iron came around more easily than he expected which caused him to lose his balance and before he could regain it, he fell over the edge of the bridge and was thereby injured. It is undisputed that after the arising of the defect, and consequent separation of the cars, there was no movement nor use, nor attempted movement or use of the defective car nor in fact of any part of the train. The testimony of all the rest of the train crew, as well as the physical facts, showed that plaintiff got the carrier iron in place and fastened; that he coupled the cars properly and coupled the air hoses; that he then stepped out to the side of the train to signal its movement, but stepped too far out and off the edge of the bridge.

That in said suit judgment has been awarded and affirmed against your petitioner in the sum of \$20,752.58 with interest at 6% per annum from May 1st, 1924.

That whether the version of plaintiff as to said accident be accepted as true, or whether the version of the other witnesses and the physical facts be accepted as true, said judgment has been awarded and affirmed against your petitioner under an erroneous application of the Federal Employer's Liability Act and the Federal Safety Appliance Acts to the facts of the case, in the following particulars:

1. Error in permitting recovery herein solely upon rights asserted under the Federal Employer's Liability Act, April 22, 1908, c. 149, 35 Stat. 65, as amended April 5, 1910, c. 143, 36 Stat. 291, in connection with the Federal Safety Appliance Acts, March 2, 1893, c. 196, 27 Stat. 531; April 1, 1895, c. 87, 29 Stat. 85; March 2, 1903, c. 697, 32 Stat. 943; April 14, 1910, c. 160, 36 Stat. 298.

2. Error in so construing the Federal Safety Appliance Act as to render nugatory the Amendment of April 14, 1910, Chap. 160, Sec. 4, which expressly permits the making on the spot of emergency repairs upon a car becoming defective while in use.

3. Error in holding that a suspension of the use of the car after the defect arose and attempting to repair it before using it further constituted a violation of the Federal Safety Appliance Act.

4. Error in holding that a defective condition arising during the use of a car properly equipped with automatic couplers, without use or attempted use of the car

after the defect arose, constituted a violation of the Federal Safety Appliance Act.

5. Error in so construing the Federal Safety Appliance Act requiring interstate cars to be equipped with automatic couplers, as to make said Act applicable to a fall from a bridge claimed by plaintiff to have been sustained by reason of losing his balance while doing repair work upon a standing and motionless car, such fall not being occasioned by any car movement nor by any contact with other cars nor by any use or attempted use of the alleged defective car or the coupling apparatus thereon.

6. Error in holding that the benefits of the Federal Safety Appliance Act relating to couplers coupling automatically by impact extend to an employe who is merely putting a coupling in condition for use, which use is distinctly of the future and not of the present.

7. Error in so construing the Federal Safety Appliance Act as to make mere possession, with no attempt at present use, of a car with the drawbar sagging down on account of a nut coming off a bolt holding up a carrier iron, a violation of said Act.

8. Error in holding that the alleged defective condition of the carrier iron which supported the drawbar was the proximate cause of plaintiff's fall and injury; when such alleged defective condition was in fact a mere incidental condition or situation presenting the occasion for plaintiff being where he was in making repairs upon a car not in present use.

9. Error in holding that separation of the couplers by reason of the dropping of the drawbar was the proximate cause of plaintiff's fall from a bridge, occurring some time after the cars had come to rest; plaintiff's only claim being that his fall was occasioned solely by his loss of balance while doing repair work and not by any movement of the cars or action of the couplers or any use or attempted use of the defective car.

10. Error in holding that plaintiff was engaged in a coupling operation at the time of his injury, when plaintiff's own claim as to the facts was that some time after the cars had come to rest after separating, and while he was pulling the carrier iron around into position preparatory to going on with further repairs to hold it in place, he lost his balance and fell from the bridge on which the car was then standing.

11. Error in holding that mere intention to couple onto the car after the coupling apparatus had been repaired constituted the act of repairing a coupling operation.

12. Error in holding that a fall from a bridge caused by loss of balance while making repairs upon a defective carrier iron on a standing car is within the evils against which the Federal Safety Appliance Acts are directed.

13. Error in holding that the Federal Safety Appliance Act requiring interstate cars to be equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars, applies to repair

work upon a defective coupling apparatus on a standing and motionless car.

14. Error in denying defendant's motion for a directed verdict made at the close of all of the testimony and upon the ground that the evidence conclusively shows that the plaintiff assumed all risks incident to doing his work upon the bridge in the manner he did it, and that his fall and resulting injury arose solely from the risk so assumed.

15. Error in denying defendant's motion for a directed verdict at the close of all the testimony on the ground that it appeared from the undisputed facts that plaintiff was guilty of negligence in not selecting a suitable place to do the work of repairing the defective carrier iron and chose to make such repair in a hazardous place; and that under the circumstances such negligence on his part was the sole and proximate cause of his fall and injury.

16. Error in denying defendant's motion for judgment notwithstanding the verdict.

17. Error in entering judgment in favor of plaintiff and against defendant.

The particular facts and grounds upon which this application is based are as follows:

October 27th, 1920, petitioner's way freight No. 43 left Stevens Point, Wisconsin, for a regular trip west-erly to Superior, Wisconsin, a distance of something more than 200 miles. At Owen, a point en route, the

train picked up an empty Lehigh Valley box car. The train continued to Ladysmith, Wisconsin, a division point, where the train crew was changed; among the new crew was plaintiff, acting as rear brakeman; he was a man 32 years of age and had been working as a brakeman for about 12 years. The train, as it left Ladysmith, consisted of 70 cars, the Lehigh Valley car being 30 cars ahead of the caboose and the fortieth behind the engine. The train progressed without any mishap for about 70 miles to a point west of a station called Gordon and east of a station called Solon Springs. This point was reached about 6 o'clock in the afternoon, and up to that time and place there had been no trouble of any kind in the operation of the train. The train passed through Gordon without stop and had proceeded about 2 miles westerly therefrom when it broke in two, the air hose parted setting the automatic brakes in emergency on both sections of the train. Plaintiff went forward from the caboose to ascertain what had happened. He found the two sections of the train standing about 12 feet apart, the open space between them being on a bridge over the St. Croix River. The last car of the front section was the Lehigh Valley car; the carrier iron on the rear or easterly end of this car was down on the right hand or northerly side. The nut had come off of the bolt holding up that side of the carrier iron, which had in turn allowed the drawbar to sag down on that side uncoupling the car from the one next to it. The sole bad order feature was the coming off of the

nut from the lower end of the bolt on the right hand side of the carrier iron. Plaintiff testified that he got the carrier iron back into position and blocked up the drawbar; that he then coupled the train and caused it to be backed up, intending to run back to Gordon and place the train on a siding to permit a passenger train to pass. The train backed about 20 feet but parted again in the same place and came to a stop with the Lehigh Valley car still on the bridge and separated from 4 feet to 6 feet from the car behind it. Thereupon plaintiff descended from the car from which he had given the signals and undertook to make the repairs necessary upon the carrier iron. Both sections of the train were, and remained, motionless and with the brakes set. Plaintiff says he then placed his left knee under the drawbar, raised it and attempted to pull the carrier iron back into place; that the carrier iron had swung around under the drawbar and nearly parallel to it and that it was necessary to pull it around at right angles with the drawbar. He states that the carrier iron seemed to stick, so he braced himself, gave a harder pull and raised up more on the drawbar, whereupon the carrier iron came around more easily than he expected. He says the hard pull, the position of his left knee under the drawbar and the unexpected release of the carrier iron caused him to lose his balance; he moved his right foot quickly to regain his balance, but his right foot went down between the bridge ties, he fell outward toward the right or northerly side of the bridge, and not being

able to recover himself, he went over the edge of the bridge, striking on a cross-timber, sustaining the injuries for which this suit is brought.

Under these alleged facts, the action was brought solely for violation of the Federal Safety Appliance Act; it being alleged that a defect in the coupling apparatus was the proximate cause of plaintiff's fall and injury. Petitioner interposed a demurrer to the complaint upon the ground that the facts stated did not constitute a violation of the act, nor did the alleged violation of the act appear to be the proximate cause of plaintiff's injury. The demurrer was overruled, whereupon defendant interposed a general denial of all the material allegations of the complaint. In due time the cause came on for trial in the lower state court, at which time petitioner saved all its rights and contentions by appropriate objections to testimony and requests for instructions in its favor. The first trial resulted in a verdict in favor of the plaintiff for \$15,000.00. Petitioner made a motion for judgment notwithstanding the verdict, or if that be denied, for a new trial. This motion being denied by the lower court, the case was appealed to the Supreme Court of Minnesota which court held that petitioner was not entitled to judgment notwithstanding the verdict but was entitled to a new trial by reason of error in refusing certain requests for instructions. See *Goneau v. Minneapolis, St. Paul & Sault Ste. Marie Railway Company*, 154 Minn. 1; 191 N. W. 279. Upon that appeal the Supreme Court of the state of Minne-

sota (erroneously, we think) held and stated as follows:

"Defendant insists that its motion for judgment should have been granted because the automatic coupler provisions of the Federal Safety Appliance Act apply only where a car is moved for the purpose of coupling or uncoupling it, and that they do not apply if the injury results from an attempt to repair a defective coupler on a motionless car. We do not stop to inquire whether this is a correct interpretation of the act. The conditions were such that a coupling could not be made automatically by impact. If plaintiff was attempting to bring the drawbar back to its proper position so the coupling could be made, we think the protection of the act extended to him while he was so engaged. *Louisville etc. Ry. Co. v. Layton*, 243 U. S. 617, followed in *Clapper v. Dickinson*, 137 Minn. 415.

Assuming that the accident happened in the manner described by plaintiff, can it be said that the violation of the act was the proximate cause of his injuries? We think the question requires an affirmative answer. It matters little whether he was attempting to make the coupling or right the position of the drawbar so the coupling could be made automatically by impact. In either case the chain of events extended uninterruptedly from the defective appliance to the injury and there was the direct causal relation which the law requires. *Erie Ry. Co. v. Russell*, 183 Fed. 722, S. C. 220 U. S. 607; *Louisville & N. Ry. Co. v. Layton*, *supra*; *Pounds v. C. G. W. Ry. Co.*, 114 Minn 312; *Burho v. M. & St. L. Ry. Co.*, 121 Minn. 326. Neither can it be said that such an accident as this was so improbable that it could not reasonably be foreseen. There are bridges on all railroads and a defective coupler may cause a train to break in two anywhere and at any time. The facts bring the case within

the rule as to foreseeable consequences. See *Christianson v. C. St. P. M. & O. Ry. Co.*, 67 Minn. 94; *Foss v. C. B. & Q. Ry. Co.*, 187 N. W. 609. If plaintiff's testimony is true, and it was for the jury to determine whether it was, there was no error in the denial of defendant's motion for judgment notwithstanding the verdict"

Upon the second trial of the cause, there was a verdict in favor of plaintiff for the sum of \$20,000.00; and upon said trial, as upon the first, petitioner saved all its rights and contentions by appropriate objections to the testimony and requests for instructions in its favor. It again made a motion for judgment notwithstanding the verdict or a new trial, which motion was in all things denied by the lower court and petitioner again appealed to the Supreme Court of Minnesota. Upon that appeal petitioner contended that the lower court erred in the several respects hereinbefore pointed out in its assignments of error in this petition. The Supreme Court of the state of Minnesota affirmed said order of the lower court and its opinion is printed at pages 774 to 782, both inclusive, of the record herein. The case was then remanded to the lower court where final judgment was entered and from said final judgment an appeal was again taken by petitioner to the Supreme Court of Minnesota, petitioner making the assignments of error found at pages 790 to 797, both inclusive, of the record. All said assignments were overruled and the Supreme Court of the state of Minnesota, in a *per curiam* opinion appearing at page 801 of the record, adhered to its form-

er decision and ordered judgment against petitioner in the sum of \$20,752.58 which judgment was duly entered on May 1st, 1924, in said Supreme Court.

Your petitioner further represents that said judgment has been rendered, and petitioner's liability affirmed, under an erroneous application of the law to the facts and that it is essential to the proper disposition of cases arising under the Employer's Liability Act and the Safety Appliance Acts that this court should establish and apply uniform rules as to these matters for all parties concerned and that without such uniform rules these matters of the gravest general importance must be left for their determination to the conflicting adjudications of the various state courts.

Wherefore, because, and by reason of, the general interest in, and the general importance of, the issues involved, and for the other reasons hereinbefore stated, your petitioner prays that a writ of certiorari to review said cause be issued to said Supreme Court of Minnesota, as in such case is provided by Sec. 237 of the Judicial Code as amended by the act of September 6, 1916 (39 Stat. L., 726).

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE  
RAILWAY COMPANY, *Petitioner*,  
BY MARSHALL A. SPOONER,  
JOHN E. PALMER,  
*Its Attorneys.*

STATE OF MINNESOTA,

ss.

County of Hennepin.

John E. Palmer being duly sworn, upon his oath says that he is one of the counsel for the petitioner Minneapolis, St. Paul & Sault Ste. Marie Railway Company, that he has read the foregoing petition and well knows the contents thereof, that he has also carefully read the certified copy of the Transcript of the Record which accompanies the petition herein, being a transcript of the record of the case at bar in the District and Supreme Courts of the state of Minnesota; that the matters in said petition are, in the judgment of affiant, supported in and by said Transcript of Record, that he knows of the proceedings had in said cause, and that the matters stated in this petition are true to the best of affiant's knowledge, information and belief.

JOHN E. PALMER.

Subscribed and sworn to before me this 16th day of May, 1924.

ALFRED O. BJORKLUND,

(Notarial Seal)

Notary Public,

Hennepin County Minnesota.

My commission expires November 14, 1929.

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I hereby certify that I have carefully examined the foregoing petition for writ of certiorari, that the allegations thereof are true as I verily believe, that in my opinion the petition is well founded and the case is one in

which the prayer of the petitioner should be granted by this court.

JOHN E. PALMER,  
Counsel for Petitioner.

### BRIEF.

This action is brought to establish a liability depending solely on acts of Congress.

*2d Employer's Liability Cases (Mondou v. N. Y., Etc., R. Co.), 223 U. S. 1.*

*Seaboard A. L. R. Co. v. Horton, 233 U. S. 492.*

It therefore involves rights that exist exclusively under Federal statutes and, being such, presents Federal questions for determination by this court.

*St. Louis, Etc., R. Co. v. McWhirter, 229 U. S. 265.*

By its opinions herein the Supreme Court of Minnesota has overruled all of petitioner's contentions and has affirmed the existence of liability in this cause. By this application petitioner seeks a review of such conclusions. It is respectfully submitted that this judgment of the highest court of Minnesota is incorrect in the following respects:

1. Error in permitting recovery herein solely upon rights asserted under the Federal Employer's Liability Act, in connection with the Federal Safety Appliance Acts.

To sustain a recovery under the Safety Appliance Act

there must be, (a) a violation of the Act, (b) injury proximately resulting therefrom.

*Davis v. Wolfe*, 263 U. S. 239.

*McCalmont v. Penna Co.* (1922 C. C. A.), 283 Fed. 736; certiorari denied, 260 U. S. 751.

*St. L. & S. F. R. R. Co. v. Conarty* (1915), 238 U. S. 243.

*G. N. Ry. Co. v. Wiles* (1916), 240 U. S. 444.

*Lang v. N. Y. C. R. Co.* (1921), 255 U. S. 455.

*F. W. & D. C. Ry. Co. v. Smithers* (1923 Tex.), 249 S. W. 286,

*Phillips v. Penna. R. Co.* (1922), 283 Fed. 381; certiorari denied, 260 U. S. 731.

*Davis v. Hand* (1923, C. C. A. 8th), 290 Fed. 73, 76; certiorari denied, 263 U. S. 705.

*P. & R. Ry. Co. v. Eisenhart*, 280 Fed. 271; certiorari denied, 260 U. S. 723.

(a) The statute is one of operation. It is made unlawful "to haul or permit to be hauled or used, any car not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." The injury must result directly and proximately from the actual *operation* of the appliance in the uses for which it is designed. If there is no use, or attempted use, of the car after the defect arises, there is no violation of the statute.

In *Delk v. St. L. & S. F.*, 220 U. S. 580, this court makes use of the following language:

*"After the coupler became defective and could not be coupled without going between the ends of the cars, it became unlawful for the railroad company to haul it, or permit it to be hauled or used on its line. It then became the duty of the railroad company to withdraw the car from use and have it repaired to conform with the law before using it further. It did not do this but continued to use the car in its defective condition."* (Italics ours in all cases.)

In the instant case, after the car become defective petitioner *did* refrain from using it and endeavored to have it repaired before using it further. It was while making this repair that plaintiff was injured; not from the failure of the coupler to work automatically, but from the method, place and manner chosen by him to do the work. The testimony of plaintiff at page 37 of the record is as follows:

"Q. When you found the coupler in that condition, you may state whether or not the coupler was in such condition that you could couple up that train.

A. No, not unless I fixed it.

Q. What was your duty at that time as brakeman?

A. Repair it and get the train going."

In *McCalmont v. Penna. R. Co.*, 273 Fed. 231, in which this court denied a writ of certiorari, it is said:

"It is only when the use is in connection with the *movement or hauling* of the car in the forbidden manner that the Safety Appliance Act can be said to apply."

Further upon the proposition that there must be in-

jury proximately resulting from an actual *use* or *hauling* of the car, we cite:

*St. L. & I. M. v. Taylor*, 210 U. S. 281.

*C. B. & Q. v. U. S.*, 220 U. S. 559.

*C. R. I. & P. v. Brown*, 229 U. S. 317.

*U. S. v. A. T. & S. F.*, 167 Fed. 696.

Certainly it must be said that there was no violation of the act *prior* to the separation for the reason that up to the moment of separation the coupler functioned properly.

(b) But the violation of the act (if there was any) *after* the first separation did not cause injury to plaintiff. Although it was necessary for him to go into the space between the standing cars in order to make the repair, it was not necessary to go between the cars at all in order to make the coupling after the repair was completed. He states that when the movement began and the first coupling was made he was on top of the cars in a position of absolute safety. When the coupling made, he descended and coupled the air hose. He then returned to his place of safety on top of the cars and so remained until after the coupling again separated and the cars came to rest. The *act* of coupling did not injure him, the *failure of the coupling* did not injure him. The movement had not been made in violation of the law because the cars *had* coupled automatically by impact and they could be uncoupled without the necessity of going between the cars. *Nothing more was done* by any force or instrumentality under control of petitioner.

After the coupling had failed, plaintiff descended from the top of the cars and in the course of his repair work he lost his balance and fell from the bridge. There was therefore no violation of the Safety Appliance Act proximately resulting in injury to the plaintiff. The Supreme Court of Minnesota simply assumes that a violation of the Act injured plaintiff. It does not point out any violation, nor in what manner any violation caused the injury.

2-3-4. Error in so construing the Safety Appliance Act as to render nugatory the Amendment of April 14, 1910, Chap. 160, Sec. 4.

The act of 1893 penalized *any* use or hauling of a car with a defective coupler. It took no cognizance of the likelihood of defects arising in transit. Adhering to the letter of the law, the courts almost uniformly penalized even the necessary hauling to a repair point of a car the coupler of which had become defective in transit. *Erie R. Co. v. U. S.*, 240 Fed. 28. One Court rebelled at this narrow construction of the Act, and held that it should be reasonably construed, and refused to require the abandonment of a car becoming defective while in use. *Seigal v. N. Y. C.*, 178 Fed. 873. Congress then came to the rescue and enacted the Amendment of April 14, 1910. The Amendment is as follows:

"Provided, that where any car shall have been properly equipped, as provided in this Act, and the other Acts mentioned herein, *and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of*

*railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by Section four of this Act or Section six of the Act of March second, eighteen hundred and ninety-three as amended by the Act of April first, eighteen hundred and ninety-six, if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this Section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employe caused to such employe by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this Act and the other Acts herein referred to."*

Disregarding this Amendment the Minnesota Supreme Court holds in effect that emergency repairs made upon the spot constitute a violation of the Act and that the railway is an insurer of the safety of an employe from any and every peril whatsoever while engaged in making such repairs. This cannot be the law. *Observance* of the law cannot constitute its *violation*. The Supreme Court of South Carolina well says, "It is the law of the Federal Statute that such repairs must be made on the spot." *Lorick v. S. A. L. Ry.*, 108 S. C. 100; 93 S. E. 332.

And in *Flack v. A. T. & S. F.*, 285 Mo. 29, which was the case of a boiler foreman injured while inspecting and attempting to repair a locomotive boiler and for the pur-

pose of avoiding assumption of risk, it was contended that the Federal Safety Appliance Act was applicable.

The court said :

"The engine was undeniably being prepared for use in interstate traffic, and the deceased met his death while engaged in that preparation. The work then being done was necessary in order to avoid a violation of the provisions of the Act whose penalties respondent now invokes. For all these reasons, this suggestion can avail respondent nothing."

Writ of certiorari in this case was denied. 250 U. S. 690. See also :

*Berry v. Dir. Gen.*, 173 Wis. 473.

*U. S. v. Erie R. R. Co.*, 237 U. S. 402.

*U. S. v. A. T. & S. F. R. R. Co.*, 220 Fed. 215.

5-6. Error in so construing the Federal Safety Appliance Act as to make it applicable to a fall from a bridge caused by loss of balance while doing repair work upon a standing and motionless car.

Counsel for plaintiff in his argument to the jury (p. 677 of the Record) made this statement—

"They (Congress) passed a law in 1893 \* \* \* requiring companies to have upon their cars couplers that would couple and uncouple automatically without the necessity of the brakeman or employe going between the cars for the purpose of making such coupling or uncoupling or for the purpose of repairing and fixing a defective coupler so it would couple, *when the repairing is done by other than car repair men*. That is the purpose of the law. The law requires the railroad company to see to it at their peril that that coupler is always right; always right."

The Supreme Court of Minnesota held in effect that the foregoing was a proper and correct statement of the law. We submit that it is not so. Nothing in the law gives any warrant for saying that a *brakeman* engaged in doing repair work upon a defective coupler may recover for injuries sustained by falling from a bridge, while a *repair man* could not recover for injuries sustained under the same circumstances. In the *McCalmont* case, *supra*, this statement is made, and we submit it is a correct statement of the law.

"It does not follow that they (the benefits of the act) extend to one who is merely putting the coupling in condition for use which, though it may come soon, is distinctly of the future and not of the present."

The state courts have made the same holding. Thus in *Rittenhouse v. St. L. & S. F.* 252 S. W. (Mo.) 954, the court says:

"He (plaintiff) did not go between the cars for the purpose of making a coupling. The first two cars had become stationary, so that, if he had desired, he could not have coupled the cars by impact. His sole purpose was to *repair the coupler*. It is true that the repair contemplated its future use; *but the repair would not be extended to the act of coupling the cars.*"

If the last sentence of counsel's statement is the law, it is plain that petitioner, through plaintiff, was fulfilling, and not violating, the law when plaintiff was injured.

7. Error in so construing the Federal Safety Appli-

ance Act as to make mere possession, with no attempt at present use, of a defective car, a violation of the Act.

It is squarely held in *St. L. & S. F. v. Conarty*, 238 U. S. 243 and *Lang v. N. Y. C.*, 255 U. S. 455, that possession of a defective car without use is not a violation of the Act. In this case let it be supposed that when plaintiff reached the point of separation of the cars, he had crawled on his hands and knees between the rails to ascertain the trouble; on account of the drawbar sagging down he bumped his head against it to his injury; we would have an identical situation as arose in the Lang and Conarty cases, except that the approach of the plaintiff to the defective cars in the Conarty and Lang cases was caused by the active force of the railway instead of solely by the plaintiff himself. All that can be said here, and all that is claimed by the Minnesota Supreme Court is, that if the carrier iron had not been loose plaintiff would not have pulled upon it and therefore would not have fallen. Exactly the same may be said in the supposititious case noted that if the drawbar had been up in position plaintiff would not have bumped his head upon it. But, as this court says in the Lang case:

"Necessarily there must be causal relation between the fact of delinquency and the fact of injury • • • It may be said that, notwithstanding, he would not have been injured if the car collided with had been equipped with drawbar and coupler, we answer, as the Court of Appeals answered, still 'the collision was not the proximate result

of the defect. Or, in other words, and as expressed in the Conarty case, that the collision, under the evidence, cannot be attributed to a violation of the provisions of the law,' but only that had they been complied with, it (the collision) would not have resulted in injury to the deceased."

8-9. Error in holding that the defective condition of the carrier iron was the proximate cause of plaintiff's injury, when such defective condition was a merely incidental *condition* or *situation* presenting the *occasion* for plaintiff being where he was in making repairs upon a car not in present use.

In the McCalmont case, *supra*, the court says, in discussing the Conarty case:

"As I understand that statement of the law, it is that the deceased would not have been injured had the drawbar or coupler been in place on the crippled car, but that their absence was not what in law is called a proximate cause of the injury \* \* \*. In that view of the law, the crippled car was a condition, but not a cause of the accident."

In discussing the Lang case, the court says:

"It (the opinion) is rested on the ground that there was no causal connection, in a legal sense, between the violation of the Safety Appliance Act and the injury. In this view the defect, as well as the presence of the defective car, was a condition of the injury, and not a proximate cause of the injury."

Applying this rule to the case then under consideration the court said:

"The condition of the defective car must, in the light of the Conarty and Lang cases, be regarded, at

most, only as a condition and not as a proximate cause, of the accident."

*Davis v. Wolfe*, 263 U. S. 239.

In *S. P. v. Berkshire*, 254 U. S. 415, this court held that where the main driving pin on a locomotive was getting hot and the engineer was, at the time of the accident, leaning out of the side window of the cab to look at it and in so doing struck his head against a mail crane and was killed, recovery could not be had because the deceased assumed the risk. This court did not consider the defective condition of the engine (clearly a violation of the Safety Appliance Act) any part of the proximate cause of the accident, but only the occasion for Berkshire being in a perilous position. See also *McDougall v. A. T. & S. F.* 186 Pac. (Kans.) 1028 in which a writ of certiorari was denied by this court, 254 U. S. 629.

See also:

*Gt. Nor. R. Co. v. Wiles*, 240 U. S. 444.

*Judd, Admr. v. So. Ry.*, 188 S. W. (Ky.) 880.

*Derive v. C. & C. R.*, 102 N. E. (Ill.) 807.

*Fletcher v. S. D. Cent.*, 155 N. W. (S. D.) 3.

*Brown v. D. S. S. & A.*, 147 Minn. 167.

*Sorrell v. M. K. & T.*, 250 S. W. (Tex.) 768.

*Norgate v. D. & R. G.*, 141 Fed. 247.

*Boldt v. Penna. R. R. Co.*, 245 U. S. 441.

*Flack v. A. T. & S. F.* 285 Mo. 28; certiorari denied 256 U. S. 690.

*Powers v. Hocking Valley*, 31 Ohio Cir. Ct. Rep. 488.

10-11. Error in holding that plaintiff, while repairing the carrier iron, was engaged in a coupling operation.

In this connection the Minnesota Supreme Court says:

"Under the circumstances he (plaintiff) was actually engaged in a coupling operation."

It appears from the testimony that after getting the carrier iron into place, it was necessary for plaintiff to fasten it up by putting a nut on the end of the bolt or blocking up the drawbar with small wooden wedges, he would then step out to the side of the train and signal a back-up movement, the cars would then come together and if the coupling made, he would connect up the air and open the angle cocks. The act of signalling the train to back would necessarily arise subsequent to the making of the repairs. Yet the Minnesota Supreme Court holds that if plaintiff lost his balance while doing the signalling (nearer in point of time to the coupling operation), he would not be within the protection of the Act because not engaged in a coupling operation. But plaintiff was not engaged in a coupling when he fell and he distinctly says he was engaged in making repairs. See *Davis v. Hand*, *supra*, *Rittenhouse v. St. L. & S. F.*, *supra*. *McCalmont v. Penna. R. Co.*, *supra*. Mere intention to couple onto the car after the coupling apparatus had been repaired did not constitute the act of repairing a coupling operation.

To sustain this holding the Minnesota Supreme Court

cites the case of *Erie v. Russell*, 183 Fed. 722, and it states that the reasoning of the Circuit Court of Appeals was approved by this court, since a writ of certiorari was denied. Reference to that case in the reports of this court, 220 U. S. 607, shows that it was dismissed for want of jurisdiction. After that statement it is said, "Writ of Certiorari denied." We submit that this is in no way equivalent to an affirmance of the reasoning of the lower court. *Hamilton v. Wolf Bros.*, 240 U. S. 251. The lower court in the *Russell* case really impeaches its own reasoning by saying:

"Indeed, were the questions to be decided free of authority, a majority of the court would have difficulty in holding the repair of the coupler was a part of the coupling operation, and bore such a relation to the impact of the cars that the necessity for such repairs was an efficient cause of the accident."

The court then goes on to say:

"Moreover it appears that it was intended to couple the cars with the defective coupler to the standing cars as soon as the coupler should be repaired."

By this language the court impliedly admits the independence of repair from coupling. The *Russell* case is no authority for the holding in this case. The court speaks specifically of the injury being caused by the *impact of the cars*. *Russell* was in the very situation against which the Safety Appliance Acts were designed to guard. He was injured by the very dangers intended

to be obviated thereby. There was an act of coupling, though premature and unexpected. But here no act of coupling was in progress or contemplated at the time plaintiff lost his balance and fell from the bridge. The fact that he was pulling upon the iron which supported the coupling apparatus is immaterial. He might just as well have been pulling upon a hot box or a car door.

12-13. A fall from a bridge caused by loss of balance while making repairs upon a standing car is not within the evils against which the Safety Appliance Acts are directed.

In *St. L. & S. F. v. Conarty*, 238 U. S. 243, the court says:

"It is very plain that the evils against which these provisions are directed are those which attended the old fashioned link and pin couplings, where it was necessary for men to go between the ends of the cars to couple and uncouple them, and where the cars, when coupled into a train, sometimes separated by reason of the insecurity of the coupling \* \* \*."

The Federal Courts have gone no further than the propositions embodied in this statement.

In *L. & N. R. v. Layton*, 243 U. S. 617, the failure of couplers to work automatically in a switching operation resulted in a collision of cars, from one of which a brakeman was thrown while preparing to release brakes; and in *M. & St. L. v. Gottschall*, 244 U. S. 66, a brakeman was thrown from a train as the result of defective couplers coming open while the train was in motion. But as stated in the *McCalmont* case, the benefits of the Act

were, by the Layton case, extended from persons required to go between cars to make couplings, to employees in other situations injured as a direct result of the failure to comply with such provisions. But it is certain that holding an employe on a bridge was never designed as a purpose of automatic coupling. The failure of the coupling had occurred, the mischief put in operation thereby had ceased, long prior to plaintiff's fall.

See also:

*C. M. & St. P. v. Voelker*, 129 Fed. 522.

*U. S. v. C. M. & St. P.*, 149 Fed. 486.

*C. & O. Ry. Co. v. Charlton*, 247 Fed. 34.

In *Johnson v. S. P. Co.*, 196 U. S. 1, this court, per Fuller, C. J., says:

"The risk in coupling and uncoupling was the evil sought to be remedied, and that risk was to be obviated by the use of couplers actually coupling automatically."

14-15. Plaintiff was himself an independent intervening cause which broke the causal chain.

The evidence conclusively shows that plaintiff's injury was occasioned solely by his fall from the bridge. His fall was occasioned solely from his failure to preserve his balance while doing his work. It seems to us that *G. N. Ry. v. Wiles*, 240 U. S. 445, is directly in point. Likewise *Radclif v. A. C. L.*, 271 Fed. 304. In this connection we also cite *Mfrs. Acci. Ind. Co. v. Dorgan*, 58 Fed. 945, an opinion by Chief Justice Taft, then Cir-

cuit Judge. There the conditions of an accident policy absolved the insurer from liability for injury or death happening directly or indirectly, in whole or in part, in consequence of disease, intoxicating liquor or bodily infirmity. Deceased, while fishing, fell from the bank into the stream and was drowned. His Honor Judge Taft says :

“We are of the opinion that in the legal sense and within the meaning of the last clause, if the deceased suffered death by drowning, no matter what was the cause of his falling into the water, whether disease or a slipping, the drowning in such case, would be the proximate and sole cause of the disability or death, unless it appeared that death would have been the result, even had there been no water at hand to fall into. The disease would be but the condition; the drowning would be the moving, sole and proximate cause.”

Likewise, it would seem here that it is incumbent upon plaintiff to show that the failure of this coupler to work would have caused his injury though there had been no bridge and no loss of balance on his part. It would seem here that the sole, moving and proximate cause of plaintiff's injury was his own negligence in doing his work upon the bridge in the manner which he did it and that the coupler, as such, had no such causal relation to his fall and injury as the law requires.

We respectfully submit that to extend the benefits of the Federal Safety Appliance Act relating to automatic couplers to such an act as loss of balance while doing repair work upon a car would lead to results directly at

variance with the decisions of this court and directly at variance with the settled law of the land.

It is therefore respectfully submitted that a writ of certiorari should be granted.

MARSHALL A. SPOONER,

*Bemidji, Minnesota,*

JOHN E. PALMER,

*1427 First National Soo Line Bldg.,*

*Minneapolis, Minnesota,*

*Attorneys for Petitioner.*

## NOTICE.

To Ernest J. Goneau, plaintiff and Samuel A. Anderson, Esq., his attorney of record:

Take notice that on Monday, June 2nd, 1924, at 12 o'clock noon, the above petition for writ of certiorari and brief accompanying same, together with certified copy of the Transcript of Record and all proceedings had in the Supreme and District Courts of Minnesota, will be submitted to the Supreme Court of the United States for its consideration and action.

Respectfully yours,

MARSHALL A. SPOONER,

*Bemidji, Minnesota,*

JOHN E. PALMER,

*1427 First National Soo Line Bldg.,*

*Minneapolis, Minnesota.*

Service of the foregoing notice and receipt of copy of the petition for writ of certiorari and brief attached thereto is hereby acknowledged this 17th day of May, 1924.

SAMUEL A. ANDERSON,

*Attorney for Ernest J. Goneau, Plaintiff.*

FILED

MAR 5 1925

WM. R. STANSBURY

**Supreme Court of the United States.**

OCTOBER TERM, 1924 1925

No. 76

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY  
COMPANY, *Petitioner,*

*vs.*

ERNEST J. GONEAU,  
*Respondent.*

**BRIEF OF PETITIONER IN OPPOSITION TO MOTION  
BY RESPONDENT TO DISMISS OR TRANS-  
FER TO THE SUMMARY DOCKET.**

MARSHALL A. SPOONER,  
*Bemidji, Minnesota,*  
JOHN E. PALMER,  
*1427 First National Soo Line Bldg.,*  
*Minneapolis, Minnesota,*  
*Attorneys for Petitioner.*



# Supreme Court of the United States.

OCTOBER TERM, 1924.

No. 413.

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MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY  
COMPANY, *Petitioner,*

*vs.*

ERNEST J. GONEAU,  
*Respondent.*

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## BRIEF OF PETITIONER IN OPPOSITION TO MOTION BY RESPONDENT TO DISMISS OR TRANS- FER TO THE SUMMARY DOCKET.

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### I.

THE WRIT WAS PROPERLY GRANTED AND THE COURT  
FULLY ADVISED AS TO THE FACTS.

Final judgment in this cause was rendered against petitioner in the Supreme Court of Minnesota May 1st, 1924. Petitioner proceeded with reasonable expedition to obtain a writ of certiorari from this Court. May 17th, 1924, it served upon respondent its petition, brief and notice; noticing the hearing for Monday June 2nd. May 28th petitioner filed in this Court its petition, brief and notice, accompanying same with thirty copies, and one certified copy and nine uncertified copies of the

entire Record in the state courts. Respondent, in proper time prior to the hearing, served and filed his brief in opposition to the petition. The first three pages of that brief are devoted to a "Statement of Facts." Seven pages of the petition are likewise devoted to a statement of the facts. The matter was presented by the Clerk on June 2nd, and an order granting the petition was filed June 9th. July 10th petitioner paid to the Clerk \$1,105.00, balance of estimated cost of printing the Record and Clerk's fees. Respondent made no move in the matter until February 12th, 1925, when he served upon petitioner this motion to dismiss or transfer to the Summary Docket.

There is no reason for any misunderstanding of the facts here. A comparison of the statement of facts contained in the petition, in respondent's brief in opposition thereto, and the statement of facts now made by respondent upon this motion, discloses no material variance between any of them. Petitioner is mindful of the fact that the Supreme Court of Minnesota assumed, and that this Court will assume, that the facts detailed by respondent with respect to the accident were found by the jury to be true. The printed Record on file in this Court consists of 756 pages; but only 74 pages are taken up by respondent's version of the accident on both direct and cross examination. It would seem, therefore, a simple matter to make an accurate digest of the facts testified to by respondent. This, petitioner studiously endeavored to do and we believe its success is demonstrated by the fact that there is no substantial difference between petitioner's statement and the two statements submitted by respondent.

Respondent takes exception to the following statement in the petition:

"The testimony of all the rest of the train crew, as well as the physical facts, show that plaintiff got the carrier iron in place and fastened; that he coupled the cars properly and coupled the air hoses; that he then stepped out to the side of the train to signal its movement, but stepped too far out and off the edge of the bridge."

This statement is truthful and accurate, as reference to the Record will show. Indeed, respondent does not question its truthfulness, he says, "it is merely a brief of the testimony on behalf of petitioner, contradicted by testimony on behalf of respondent." We are aware of that, but we deemed it our duty to give a brief summary of all the facts in the Record. This statement of seven lines is all the reference that is made to the testimony of petitioner, it was made in good faith and surely did not tend to mislead the Court for it is followed immediately by this statement:

"That whether the version of plaintiff as to said accident be accepted as true, or whether the version of the other witnesses and the physical facts be accepted as true, said judgment has been awarded and affirmed against your petitioner under an erroneous application of the Federal Employer's Liability Act and the Federal Safety Appliance Acts to the facts of the case, in the following particulars."

Then follow the specifications of error; which specifications are in turn followed by a more full and detailed statement of the facts.

Respondent says the following statement in the petition is not warranted by the Record:

"It is undisputed that after the arising of the de-

fect and consequent separation of the cars there was no movement, nor use, nor attempted movement or use of the defective car, nor in fact of any part of the train."

We beg the indulgence of the Court to quote briefly from respondent's testimony in the Record as to what occurred while he was repairing the carrier iron (fols. 366, 367) :

"Q. Well, did you feel any movement?

A. No, I did not.

Q. The rear section could not move, could it?

A. It couldn't move, no, sir.

Q. It could not move; the brakes were locked on it, so *there was no movement of either section?*

A. *No, sir.*" (Italics ours in all cases.)

Respondent was, for the time being, in full charge of the train; it would not be moved except upon his signal (fols. 297, 298). The conductor was protecting the rear (fol. 1562); the fireman protected the front (fol. 1533); the head brakeman relayed respondent's signals (fol. 1178); which the engineer obeyed (fols. 298, 1424-34).

Respondent further questions the following statement in the petition:

"The sole bad order feature was the coming off of the nut from the lower end of the bolt on the right-hand side of the carrier iron."

We beg to again quote from respondent's testimony at folios 308, 309 of the Record:

"Q. When you got to the east end of the west car, that is the last car of the front section, there is where you found the trouble?

A. Yes, sir.

Q. Now, was the air hose broken at all?

A. No, sir, not as I could see.

Q. The air hoses were all right?

A. Yes, sir.

Q. So the only trouble was this burr being off of this bolt on the right-hand side of the carrier iron?

A. That and being dropped down so it let the draw-bar down.

Q. Yes, that was the only thing which was wrong, so far as you observed?

A. And the carrier iron shoved forward.

Q. Shoved toward the engine?

A. Yes, sir.

Q. That is, the right-hand end of it?

A. Yes, sir.

Q. Now, this is the only thing you found was wrong?

A. Well, I found the threads on this burr (bolt) stripped to some extent.

Q. Was that all that was wrong?

A. And the burr was gone.

Q. *You didn't notice anything else broken or out of order?*

A. *No, sir."*

At folios 228 to 233 plaintiff testifies that from the time the train left Ladysmith, Wisconsin, till it arrived at Gordon, Wisconsin (a journey of 70 miles), no cars were discovered to be in bad order, nor did they have any trouble whatever with any car in the train. At folio 80 he testifies that two stops were made for coal and water and a third stop for passing a passenger train, he then testifies that no one of the train crew had any reason to believe, up to the time of the separation, that there was a bad order car in the train of 70 cars. Respondent quotes the following testimony given by the car inspector at Superior, Wisconsin (fol. 1669) :

"One buffer block broken, one end sill, two center sills bent, four horizontal carrier bolts missing, two vertical bolts missing, two vertical carrier bolts too long, one on the west side, south end, seven inches,

badly bent, and the other side three-quarters by four and a half."

Respondent then says that the car, when put in the train at Owen, Wisconsin, on the morning of October 27th, 1920, was in this "deplorable condition," and that "what happened when the train finally parted was simply a culmination of the growth of the defective condition of the coupler in question," and that we at no time so advised the Court. Certainly we did not. To have done so would have been to utter an untruth. The condition of the car described by this inspector was that which he found at Superior, Wisconsin, *October 29th, 1920*, two days after the accident (fol. 1666). Meantime the car had been hauled to Superior from Gordon, a distance of some 40 miles and there is no testimony as to what happened to it between the accident and the inspection. The Record is barren of anything warranting the statement that the car was in this condition when it was placed in the train at Owen on the morning of October 27th and respondent's statement is without foundation. If facts have been erroneously stated to this Court it has not been by petitioner.

## II.

Respondent's other attacks are directed to our assignments of error and our inferences of fact or conclusions of law. Such are not statements of fact, they are inferences which petitioner believes to be fairly deducible from the facts. Respondent says that they are not warrantable deductions either of fact or law. Whether they are warrantable deductions is, we conceive, the very

thing which this Court will decide. That it might pass upon them we conceive to be the purpose of the Court in granting this writ. Respondent states that our deductions of fact and our conception of the law applicable thereto are at variance with those of the Minnesota Supreme Court. Precisely so. That is exactly why we sought this writ and we conceive it to be the very reason why we are given this right of review.

We freely admit that we disagree both with respondent and with the conclusions of the Minnesota Supreme Court. We trust it will not be out of place to briefly point out why we believe our conclusions, to which respondent takes exception, sound. Respondent states that we are in error in concluding that he was injured while making emergency repairs upon a standing car. The Record shows that precise situation. All the cars of both sections of the train were, and remained, as motionless as though frozen in place during all of respondent's operations leading up to his fall. Indeed, the opinion of the Minnesota Supreme Court expressly states:

"Plaintiff had to *prepare* the coupler so it would couple with the other car. He was not a repair man. *Emergency repairs* which at times, he, as brakeman, was called on to make, should not place him in the class of ordinary repair men doing their work with proper tools, appliances and protection. Here the defective coupler caused plaintiff to go between the cars and attempt to *put it in condition* to couple, and in that attempt he was injured. Under the circumstances he was actually engaged in a coupling operation."

The Court further says:

"The very attempt to *prepare* it for immediately coupling up and movement of the train directly caused the plaintiff's fall."

The careful use of the word "prepare" instead of "repair" does not alter the situation. Nay more, the Minnesota Court extends the protection of the Act to cover injury sustained by any trainman from any cause while making emergency repairs upon a defective coupling apparatus. It would seem that the Minnesota Supreme Court holds that a brakeman making emergency repairs on a motionless car may recover under the Safety Appliance Act, while a repair man injured in precisely the same way may not. The Act makes no such distinction between persons.

At its first opinion, 154 Minn. 1, the Minnesota Supreme Court says:

"The conditions were such that a coupling *could not be made* automatically by impact."

We certainly do take issue with the Minnesota Supreme Court in its conclusion that the Safety Appliance Act applies under that Court's own statement as to the facts. It directly contradicts the holding in *Rittenhouse v. St. L. & S. F.*, 252 S. W. (Mo.) 945; where the Court, denying recovery under the Safety Appliance Act, says:

"He (plaintiff) did not go between the cars for the purpose of making a coupling. The first two cars had become stationary so that if he had desired he could not have coupled the cars by impact. His sole purpose was to repair the coupler. It is true that the repair contemplated its future use; but the repair would not be extended to the act of coupling the cars."

Now respondent testifies that when he came to the place where the train was parted he found the carrier iron had fallen down at one end allowing the draw-bar

to sag and cause the uncoupling of the cars. On his direct examination at folio 111, he says:

"Q. When you found the coupler in that condition you may state whether or not the coupler was in such condition that you could couple up that train.

A. No, not unless I fixed it.

Q. What was your duty at that time as brakeman?

A. *Repair it and get the train going.*"

Respondent then testifies that the following steps were necessary before any coupling could be effected:

1. Raise up the draw-bar with his knee and pull the right-hand end of the carrier iron around into a position at right angles with the draw-bar.

2. Get that end of the carrier iron over the bolt and put on a burr, or in lieu thereof get some shims from the ground at the end of the bridge and block the draw-bar up to meet the coupling on the other car.

3. Push the draw-bar over to the left as far as possible.

4. Open the knuckle on the other car and pull that draw-bar over to the right.

5. Close the angle cock on the last car of the front section (the one on which he had worked) so that the engineer could pump up the air on that section and release the brakes.

6. Climb up on top of the first car of the rear section (which he calls the good car).

7. Give back-up signal to the engineer.

8. The engineer would back the front section against the rear section and the coupling would make.

*It was while doing number one that respondent was*

*injured* by losing his balance and falling off the bridge. It seems to us entirely too far fetched to say that while doing number one he was engaged in a *coupling operation*. No coupling operation could begin until step number 8 was taken. We therefore say that the Minnesota Supreme Court is in error in holding that while engaged in step number one respondent was engaged in a coupling operation. We felt warranted in making the following statement in our assignments of error:

“Error in holding that the benefits of the Federal Safety Appliance Act extend to an employe who is merely putting a coupler in condition for use which use is distinctly of the future and not of the present.”

Also we felt warranted in saying:

“In the instant case, after the car became defective petitioner did refrain from using it and endeavored to have it repaired before using it further.”

We believe we are warranted in these statements by the holding in the McCalmont case, 273 Fed. 231, where it is said:

“It does not follow that they (the benefits of the act) extend to one who is merely putting the coupling in condition for use, which, *though it may come soon*, is distinctly of the future and not of the present.”

Let it here be noted that respondent himself does not claim that he was engaged in any coupling operation, nor does he claim that any coupling operation injured him. He states at folio 138:

“Put my knee under the draw-bar to help raise it up and got hold of the carrier iron to pull it back crossways underneath the draw-bar and it stuck,

wouldn't come; it was caught some way or other. The next time I kind of braced myself for a harder pull on it.

Q. On this last occasion, the harder pull, did you have one or both hands that time?

A. I had taken two hands then. And I raised up a little harder with my knee and give it a hard pull and it came easy. Caused me to step back down in between the ties.

Q. Which foot?

A. Right foot. Or the stringer somewhere, stepped back, lost my balance and I made a grab for the car and I missed it and went off backwards."

At folios 352, 355, on cross examination, with reference to the second pull on the carrier iron, respondent says:

"Q. And then you took both hands?

A. Yes, sir.

Q. And raised up harder with your knee?

A. Yes, sir.

Q. And you jerked still harder on your carrier iron?

A. Yes, sir.

Q. With both hands?

A. Kind of raised up at the same time.

Q. And then it slipped?

A. It let go.

Q. Came around quickly?

A. Yes, sir.

Q. Came easy?

A. Yes, sir.

Q. And you stepped down?

A. Caused me to step down.

Q. With your right foot?

A. Yes, sir.

Q. And you stepped down in between the ties?

A. I think I slipped down between the ties, yes, sir.

Q. Then brought your left foot down?

A. Well, I lost my balance when I stepped with my right foot."

From this it indubitably appears that the links in the causal chain in inverse order from the injury were:

(a) Respondent's fall, caused by (b) loss of his balance, caused by (c) sudden coming around of the carrier iron, caused by (d) his pull and raising up on the draw-bar. But it is not claimed, nor can it be, that any of these forces were set in motion by a defective coupler. The most that can be said is that the defect in the apparatus furnished the occasion for plaintiff putting those forces in motion. The case falls squarely within the principle governing the Conarty and Lang cases.

The Minnesota Supreme Court states that the condition of this carrier iron under the coupler was a clear violation of the Safety Appliance Act. If that be conceded, it does not help respondent's case. He was in no manner using the coupler *as a coupler*. The failure of the coupling and the force engendered thereby had been spent and the cars were in a motionless condition. We submit that we are correct in our assertion that after the cars had separated there was no movement nor use nor attempted movement or use of the defective car nor of any part of the train. We respectfully submit that the Minnesota Supreme Court is wrong when it says in its first opinion:

"Defendant insists that its motion for judgment should have been granted because the automatic coupler provisions of the Federal Safety Appliance Act apply only where a car is moved for the purpose of coupling or uncoupling, and that they do not apply if the injury results from an attempt to repair a defective coupler on a motionless car. We do not stop to inquire whether this is a correct interpretation of the Act."

*These were the conditions*, yet the Minnesota Supreme Court says that it will not stop to inquire whether the Safety Appliance Act applies. Why not stop to inquire? It was absolutely necessary to do so in order to correctly decide the case.

The Minnesota Supreme Court further says:

"If plaintiff was attempting to bring the draw-bar back to its proper position so that the coupling could be made, we think the protection of the Act extended to him while he was so engaged."

What protection of the Act? Manifestly the Court must mean protection from injury *caused by violation of the Act*. But there was no violation of the Act. The cars were at rest. Petitioner put in motion no force which resulted in injury to respondent. It would seem that a vital step in the logical sequence is omitted in the reasoning and that the conclusion of the Court was reached by the following process: Had plaintiff been injured by a violation of the Act while in any certain position he might recover under the Act. He was injured while in that position, by losing his balance and falling off a bridge. Ergo,—there was a violation of the Act. With great respect to the Minnesota Supreme Court, this does not seem sound legal reasoning. In *Davis v. Wolfe*, 263 U. S. 239, this Court, speaking through Mr. Justice Sanford, says:

"The rule clearly deducible from these four cases (Layton, Gottschall, Conarty and Lang), is that, on the one hand, an employe cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury."

Now, what was the *accident* here? It was plaintiff's

fall. Was the failure of the coupler to work automatically the cause of his fall? Clearly not. How could it be? That failure had occurred some time before. No further attempt was being made to operate the coupler automatically by impact. How can mischief already spent be still operative?

Continuing in the Wolfe case, this Court says:

“But merely creates an incidental condition or situation in which the accident *otherwise caused* results in such injury.”

It may be conceded that the situation or condition here was created by a defect in the coupling apparatus; it may be conceded that it needed repair; but it was, nevertheless, only a condition or situation. Upon that situation comes plaintiff. He takes hold of the carrier iron, pulls on it, it does not come. He braces himself for a harder pull, raises up more with his knee on the draw-bar, the carrier iron comes around more easily than he expected; he loses his balance and falls off a bridge. That this accident was *otherwise caused* than by a failure of the coupler to work automatically would seem too clear for argument.

In the latter part of the Wolfe decision it is said:

“And on the other hand he can recover if the failure to comply with the requirements of the Act is a proximate cause of the accident resulting in injury to him while in the discharge of his duty, although not engaged in an *operation* in which the safety appliances are specifically designed to furnish him protection.”

The statute is one of operation. As is said by this Court, speaking through Mr. Justice Van Devanter, in *St. L. & S. F. v. Conarty*, 238 U. S. 243:

"It is very plain that the evils against which these provisions are directed are those which attended the old fashioned link and pin couplings where it was necessary for men to go between the ends of the cars to couple and uncouple them, and where the cars when coupled into a train sometimes separated by reason of the insecurity of the coupling."

We do not believe we are trying to mislead this Court when we contend that this case is not within the Safety Appliance Act. The proximate cause of respondent's fall and injury was the bridge in connection with his manner and method of doing his work. The defective condition of the coupler may have been a remote cause but it was no part of the proximate cause. The case falls squarely within the apt language of Professor Beale in 33 *Harvard Law Review*, page 651 :

"Defendant's force had come to rest in a position of apparent safety; some new force then combined with this condition to create harm; the result was consequently remote from defendant's act."

Again Professor Beale says :

"Take a given situation : forces quiescent, forming a general condition of affairs, what might perhaps be called a set stage. Into this condition a new force is interjected, causing a re-arrangement of affairs, a change of condition, a new event, which we call a result. This is the first step in causation. If, then, a *second active force* comes upon the scene, causing a new result, this second result is the *indirect*, but not the direct, result of the first active force considered."

Here the first given condition or set stage might be considered to be the train in a coupled condition on its journey. Into this condition a new force is interjected, to-wit, the parting of the train causing a re-arrangement

of affairs,—*i. e.*, the parted and motionless condition of the train. This was the first step in causation and it may be admitted that it was caused by the failure of the coupling apparatus. But that did not injure respondent. Respondent then became the second active force and what he did, and that only, caused the new result, *i. e.*, his fall. But the fall must be considered the indirect, and not the direct, result of the parting of the train.

Respondent admits that he had charge of the signalling of the movements of the train; that whatever signals he gave would be obeyed by the engineer (fols. 297-298). He states that he was within 40 feet or less from the hard ground at the end of the bridge and that he might readily have signalled the engineer to pull the front section ahead off the bridge, where respondent might have done his work on the solid ground and in perfect safety (fol. 345). The accident was solely the result of the conditions, acted upon by his own negligence. The defective condition of the carrier iron did no more than reflect itself in the physical setting where he chose to do his work in the manner he did. See cases cited on page 25 of petition.

In *C. R. I. & P. v. Brown*, 229 U. S. 317, cited by respondent, this Court approves as a correct statement of the law the following instruction given by a lower Federal court:

“It is also the law, having in mind still this first count, that if the employe goes between the cars to effect an uncoupling, he is not chargeable with contributory negligence, that is, a failure to exercise ordinary care for his own safety, by the mere fact of going in between the cars to effect the un-

coupling, but he is required before he can recover to exercise ordinary care for his own safety after he goes between the cars and while he is there endeavoring to effect an uncoupling, that is, the separation of the cars."

Respondent lays great stress upon *Erie Ry. Co. v. Russell*, 183 Fed. 722, and the Minnesota Supreme Court in its second opinion states:

"In our opinion the facts of this case are more nearly within those in *Erie Ry. Co. v. Russell*, 183 Fed. 723, than any other to which attention has been drawn. Certiorari therein was denied, 220 U. S. 607. This must be taken as an affirmance of the law as stated and applied by the Circuit Court of Appeals."

This Court has announced the direct contrary of this statement as the law. In *Hamilton v. Wolf*, 240 U. S. 251, this Court, speaking through Mr. Justice Pitney, says:

"It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the decree that is sought to be reviewed."

Indeed this must be so; otherwise it might be contended with equal force that the mere granting of the writ is a reversal of the decree sought to be reviewed. This is why we do take exception to such a holding by the Minnesota Supreme Court. The *Russell* case is an old one. The accident out of which it grew occurred long prior to the passage of the present Federal Employer's Liability Law, viz., June 21st, 1907. The report of it—220 U. S. 607—is simply this:

"Dismissed for want of jurisdiction. Writ of certiorari denied."

That case arose long prior to the Conarty, Lang, Layton, Gottschall, Wolfe, and kindred cases, and long prior to any of the cases cited in the Wolfe case. We think it has been definitely overruled by the later cases and that it would not now be held to be the law. That cause of action arose, too, long prior to the Amendment of April 14th, 1910, permitting the making of emergency repairs on the spot if it be possible to do so. But see further discussion of the Russell case, pages 27 and 28 of petition.

### III.

As to transfer to the Summary Docket, we perceive no reason why this cause should not take its regular course. It has been pending a long time. As before stated, the writ was granted June 9th, 1924; and this motion was not initiated till February 12th, 1925. Meantime, and on July 10th, 1924, petitioner paid the Clerk the full estimate of cost of printing and Clerk's fees. Doubtless, printing of the Record is now well under way and the case should be reached in its regular order very soon.

We do not agree with counsel that the case is not of importance. In the Lang case, 255 U. S. 455, this Court, speaking through Mr. Justice McKenna, says:

"But necessarily there must be a causal relation between the fact of delinquency and the fact of injury, and so that case (Conarty) declares."

See also *St. L., etc., R. Co. v. McWhirter*, 229 U. S. 265.

The great principles laid down by this Court in the cases of Lang, McWhirter, Conarty, Berkshire, Boldt, Wiles, and kindred cases; as well as by the lower Fed-

eral courts in such cases as McCalmont, Hand and Phillips, and by the State Courts apart from Minnesota; appear to have been set at naught by the Minnesota Supreme Court in this case. The effect of the holding of the Minnesota Court is to make the Railway an insurer of the safety of employes against any and every peril whatsoever while engaged in doing any act relating to a defective coupling apparatus. Respondent is in no different situation than though he had pinched his finger while pulling the carrier iron around into place, or pounded his thumb while driving the shims under the draw-bar, or slipped down and bumped his head on the rail while pushing the draw-bar over, or any like occurrence. If the Federal Safety Appliance Acts are to be so extended, we submit that it should be only after very full argument and consideration.

It is therefore most respectfully submitted that the motion should be in all respects denied.

MARSHALL A. SPOONER,

JOHN E. PALMER,

*Counsel for Petitioner.*

Service of the foregoing Brief is hereby acknowledged this 2nd day of March, 1925.

SAMUEL A. ANDERSON,

*Attorney for Respondent.*

Office Supreme Court, St. P.  
FILED

NOV 5 1925

WM. H. STANSBURY  
CLERK

(30,373)

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1925.

NO. 76.

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MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COM-  
PANY, *Petitioner,*

*vs.*

ERNEST J. GONEAU,

*Respondent.*

---

ON A WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF MINNESOTA.

---

BRIEF OF MINNEAPOLIS, ST. PAUL & SAULT STE.  
MARIE RAILWAY COMPANY, PETITIONER.

---

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## SUBJECT INDEX.

|   | Page. |
|---|-------|
| Citation of Opinions of Minnesota Supreme Court to be reviewed .....      | 1     |
| Statement of grounds on which jurisdiction of this Court is invoked ..... | 2     |
| Statement of the case .....   | 2     |
| Statement of the Facts .....  | 7     |
| Statement of the Questions Involved .....                                 | 13    |
| Specifications of error relied upon .....                                 | 20    |
| Summary of the Argument .....   | 24    |
| The Argument :  |       |
| Specification No. 1 .....   | 28    |
| Specification No. 2 .....   | 35    |
| Specification No. 3 .....   | 42    |
| Specification No. 4 .....   | 44    |
| Specifications Nos. 5 and 8 .....   | 50    |
| Specification No. 7 .....   | 63    |
| Conclusion .....  | 64    |

## TABLE OF CASES CITED.

|  |                |
|--|----------------|
| Ahrens vs. C. M. & St. P. R. Co., 121 Minn. 335.....   | 25             |
| B. & O. R. Co. vs. Tittle, 4 Fed. (2nd Series) 818; certiorari denied October 12, 1925 .....                               | 56, 63         |
| Bohm vs. C. M. & St. P. R. Co., 200 N. W. (Minn.) 804; decision filed Nov. 21, 1924; certiorari denied 69 L. Ed. 440 ..... | 35             |
| Boldt vs. Penna R. Co., 245 U. S. 441 .....  | 63             |
| Brown vs. D. S. S. & A. R. Co., 147 Minn. 167 .....  | 63             |
| Burho vs. M. & St. L. R. Co., 121 Minn. 326 .....  | 25             |
| C. B. & Q. R. Co. vs. U. S., 220 U. S. 559 .....   | 41             |
| C. G. W. R. Co. vs. Schendel, 267 U. S. 287 .....  | 26             |
| Chic. Junc't R. Co. vs. King, 222 U. S. 222 .....  | 26, 36         |
| C. M. & St. P. R. Co. vs. Voelker, 129 Fed. 522 ...  | 26, 43, 59     |
| C. R. I. & P. R. Co. vs. Brown, 229 U. S. 317 .....  | 26, 47         |
| Clapper vs. Dickinson, 137 Minn. 415 .....   | 26             |
| Davis vs. Hand, 290 Fed. 73; certiorari denied 263 U. S. 705 .....   | 27, 28         |
| Davis vs. Wolfe, 263 U. S. 239 .....   | 28, 45         |
| Delk vs. St. L. & S. F. R. Co., 220 U. S. 580 .....  | 25, 30         |
| Devine vs. C. & C. R. Co., 259 Ill. 449 .....  | 62             |
| Douglas vs. Wash. Ter. Co., 298 Fed. 199 .....   | 27, 47         |
| Erie R. Co. vs. Caldwell, 264 Fed. 947 .....   | 26             |
| Erie R. Co. vs. Russell, 183 Fed. 722 .....  | 26, 33, 57     |
| Flack vs. A. T. & S. F. R. Co., 285 Mo. 28; certiorari denied 256 U. S. 690 .....  | 37, 63         |
| Fletcher vs. S. D. Cent. R. Co., 36 S. D. 401 .....  | 62             |
| F. W. & D. C. R. Co. vs. Smithers, 249 S. W. (Tex.) 286; decision filed Dec. 6, 1922 .....                                 | 28             |
| G. N. R. Co. vs. Otos, 239 U. S. 349 .....   | 25             |
| G. N. R. Co. vs. Wiles, 240 U. S. 445 .....  | 27, 28, 47, 62 |
| Hamilton vs. Wolf, 240 U. S. 251 .....   | 57             |

|   |            |
|---|------------|
| Harvard Law Review, Vol. 33, p. 633 .....   | 48         |
| Johnson vs. G. N. R. Co., 178 Fed. 643 .....  | 25, 41     |
| Johnson vs. S. P. Co., 196 U. S. 1 .....  | 25, 42     |
| Judd, Admx. vs. So. R. Co., 171 Ky. 832 .....   | 62         |
| Keenan vs. Dir. Gen'l, 285 Fed. 286 .....   | 25, 26, 41 |
| Koepp vs. Nat'l E. & S. Co., 151 Wis. 302 .....   | 54         |
| Lang vs. N. Y. C. R., 255 U. S. 455 .....   | 25, 28, 42 |
| Lanz vs. Penna. R. Co., 281 Fed. 796 .....  | 27, 49     |
| Lorick vs. S. A. L. R. Co., 108 S. C. 100 .....   | 37         |
| L. & N. R. Co. vs. Layton, 243 U. S. 617 .....  | 26         |
| McCalmont vs. Pa. R. Co., 273 Fed. 231 .....  | 32         |
| McCalmont, et al. vs. Penna. R. Co., 283 Fed. 736; certio-<br>rari denied 260 U. S. 751 ..... | 25, 28     |
| McDougall vs. A. T. & S. F. R. Co., 106 Kan. 135; certio-<br>rari denied 254 U. S. 629 .....  | 62         |
| Mfrs. Acc'd Ind. Co. vs. Dorgan, 58 Fed. 945 .....  | 47         |
| M. & St. L. R. Co. vs. Gottschall, 244 U. S. 66 .....   | 26, 29     |
| New Orleans, etc., R. Co. vs. Harris, 247 U. S. 367 ....                                      | 2          |
| N. Y. C. R. Co. vs. Winfield, 244 U. S. 147 .....   | 2          |
| Norgate vs. D. & R. G. R. Co., 141 Fed. 247 .....   | 63         |
| P. & R. Ry. Co. vs. Eisenhart, 280 Fed. 271; certiorari de-<br>nied 260 U. S. 723 .....       | 26, 29     |
| Phillips vs. Penna. R. Co., 283 Fed. 381; certiorari de-<br>nied 260 U. S. 731 .....          | 28         |
| Pounds vs. C. G. W. R. Co., 114 Minn. 312 .....   | 26         |
| Powers vs. Hocking Valley, 31 Ohio Cir. Ct. Rep. 488 ...                                      | 62         |
| Rittenhouse vs. St. L. & S. F. R. Co., 299 Mo. 199 .....                                      | 55         |
| St. L. & I. M. R. Co. vs. Taylor, 210 U. S. 281 .....   | 2, 25      |
| St. L. & S. F. R. Co. vs. Conarty, 238 U. S. 243 ..   | 25, 28, 42 |
| St. L., etc., R. Co. vs. McWhirter, 229 U. S. 265 .....                                       | 2          |
| Salsedo vs. Palmer, 278 Fed. 92 .....   | 64         |
| Seaboard A. L. vs. Horton, 233 U. S. 492 .....  | 2          |

|  |    |
|--|----|
| Second Employers Liability cases (Mondon vs. N. Y., etc.,<br>R.), 223 U. S. 1 .....          | 2  |
| Seigal vs. N. Y. C. R. Co., 178 Fed. 873 .....   | 35 |
| Sorrell vs. M. K. & T. R. Co., 230 S. W. (Tex.) 768; deci-<br>sion filed Apr. 13, 1921 ..... | 63 |
| S. P. vs. Berkshire, 254 U. S. 415 .....   | 62 |
| So. Ry. vs. Gray, 241 U. S. 333 .....  | 2  |
| Sprague vs. Wis. Cent. R. Co., 104 Minn. 58 .....  | 26 |
| U. S. vs. A. T. & S. F. R. Co., 167 Fed. 696 .....   | 37 |
| U. S. vs. A. T. & S. F. R. Co., 220 Fed. 215 .....   | 38 |
| U. S. vs. C. M. & St. P. R. Co., 149 Fed 486 .....   | 43 |
| U. S. vs. Erie R. Co., 237 U. S. 402 .....   | 37 |
| Walker vs. Detroit, 143 Mich. 427 .....  | 54 |
| Weiss vs. Belt Ry. Co., 186 Ill. App. 43 .....   | 34 |
| Woodbury Co. vs. Williams Tackaberry Co., 166 Ia. 642 .                                      | 54 |

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Certiorari granted June 9, 1924 (R. 425).

Date of Judgment to be reviewed May 1, 1924 (R. 424).

Opinions of the Supreme Court of Minnesota to be re-  
viewed.

154 Minn. 1.

159 Minn. 41 (R. 409).

The facts directly and solely involve the interpretation,

construction and application of the Federal Safety Appliance Act, March 2, 1893, c. 196, 27 Stat. 531; April 1, 1896, c. 87, 29 Stat. 85; March 2, 1903, c. 976, 32 Stat. 943; April 14, 1910, c. 160, 36 Stat. 298; in an action for personal injuries under the Federal Employers' Liability Act, April 22, 1908, c. 149, 35 Stat. 65; as amended April 5, 1910, c. 143, 36 Stat. 291; as will be seen from the Record.

The jurisdiction of this Court is invoked under the following authorities:

2d *Employers Liability Cases* (*Mondou vs. N. Y., etc., R. Co.*), 223 U. S. 1.

*Seaboard Air Line vs. Horton*, 233 U. S. 492.

*St. Louis, etc., R. Co. vs. McWhirter*, 229 U. S. 265.

*St. L. & I. M. R. Co. vs. Taylor*, 210 U. S. 281.

*New Orleans, etc., R. Co. vs. Harris*, 247 U. S. 367.

*Southern R. Co. vs. Gray*, 241 U. S. 333.

*N. Y. C. R. Co. vs. Winfield*, 244 U. S. 147.

#### STATEMENT OF CASE.

(References are to pages and, where deemed helpful, to folios, of the Printed Record in this Court. Italics our own in all cases.)

This action was commenced January 6, 1921, in the District Court of Beltrami County, Fifteenth Judicial District of Minnesota. The parties will be here designated as in the state courts; respondent Goneau as plaintiff, and petitioner Railway Company as defendant. Plaintiff seeks recovery solely under the Federal Employers' Liability Act of April 22, 1908, c. 149 (35 Stat. 65), and acts amendatory thereof, in connection with the Federal Safety Appliance Act of March 2, 1893, c. 196 (27 Stat. 531), and acts amendatory thereof; for personal injuries which he claims

to have sustained while in the employ of defendant as a brakeman. The interstate character of plaintiff's employment and of defendant's business is admitted (R. 12, f. 22).

The acts of negligence specified by plaintiff in his amended complaint, under which the action was tried, are:

1. That on October 27, 1920, plaintiff was a brakeman on an interstate freight train of defendant proceeding westerly over its road near Gordon, Wisconsin; that at a point where the track is laid over a bridge or trestle, the train parted and stopped upon said bridge because a drawbar of one of the cars was out of order permitting the automatic couplers to separate.

2. That in order to recouple the two parts of the train, it was necessary to, and plaintiff did, go between the cars and "repair and readjust and replace said drawbar in position"; the particular defect being that the carrier iron under the drawbar "had broken and fallen from its position, thus permitting and causing said drawbar to drop so that said coupling could not be made, and so that said two drawbars, if coupled, would not remain coupled."

3. "That in order to do said work it was necessary for plaintiff to stand upon said bridge; that while he was endeavoring to readjust and repair said coupler so as to enable said coupling to be made, said carrier iron, which he was attempting to draw back into place, suddenly gave way and the plaintiff was then and thereby thrown from his position and caused to fall from said bridge" sustaining the injuries complained of.

4. That the acts of defendant in permitting the drawbar to become in such condition as to necessitate repair, readjustment and replacement before the cars could be re-

coupled, or held together after recoupling, constituted a violation of the automatic coupler provisions of the Federal Safety Appliance Act (R. 1 and 2).

To this complaint defendant demurred on the ground that the facts stated did not constitute a cause of action. The specific grounds urged by defendant upon said demurrer were that the complaint, being framed solely upon an alleged violation of Section 2 of the Safety Appliance Act of March 2, 1893, showed upon its face:

(a) That plaintiff's injury did not result from the use or attempted use of the alleged defective appliance; that no act of coupling or uncoupling or hauling was in progress at the time plaintiff fell, nor could any or either of said acts take place under the conditions obtaining.

(b) That plaintiff sustained his injury while engaged in repairing the alleged defective mechanism while the train and all the cars therein were standing motionless and some distance apart upon the bridge.

(c) That plaintiff's fall and injury arose from some act of his own by which he lost his balance and fell from the bridge while repairing defective mechanism upon a motionless car.

(d) That the alleged fall and injury occurred while defendant (through the acts of plaintiff) was endeavoring to comply with the Amendment of April 14, 1910, Chapter 160, Section 4, which requires the making on the spot of emergency repairs upon a car becoming defective while in use.

(e) That if there were a violation by defendant of the Safety Appliance Act, any causal force engendered thereby had spent itself and the cars had come to rest and were not again moved up to the time of plaintiff's fall.

(f) That it was not a violation of the Safety Appliance Act to merely permit the coupling equipment to get in such condition that repairs thereon were needed.

The demurrer was overruled, and the trial court refusing to certify that the questions raised were important and doubtful, defendant was precluded from taking an appeal and was required to answer and go to trial (R. 3, ff. 14 and 15). The answer denied any negligence or violation of law or duty on defendant's part proximately causing, or contributing to, plaintiff's injury; alleged that plaintiff's injury was due solely to his own negligence and pleaded contributory negligence and assumption of risk. The reply was a general denial (R. 4, ff. 7 and 8).

The case was twice tried in the state court. Upon each trial defendant saved all its rights and contentions by appropriate objections to testimony at the opening of the trial; motion for directed verdict at the close of the testimony, and requests for instructions in its favor. The first trial was had in September, 1921, and resulted in a verdict for plaintiff for \$15,000.00. Defendant made a blended motion, under the Minnesota practice, for judgment notwithstanding the verdict or a new trial. From an order denying this motion in both respects, defendant appealed to the Minnesota Supreme Court. The order with respect to judgment notwithstanding was affirmed, but as to a new trial it was reversed and a new trial was granted for error of the trial court in refusing certain of defendant's requested instructions. See 154 Minn. 1.

The second trial was had in February, 1923, and resulted in a verdict for plaintiff for \$20,000.00. Defendant again made a blended motion for judgment notwithstanding or a new trial. The motion was in both respects denied and

defendant again appealed to the Minnesota Supreme Court; where the order was in both respects affirmed. See 159 Minn. 41. The cause was thereupon remanded to the State District Court where judgment was ordered and entered upon the verdict and for interest and costs. From this judgment defendant again appealed. The Minnesota Supreme Court affirmed the judgment and ordered final judgment entered in that court. See 159 Minn. 47. Final judgment was accordingly entered in the State Supreme Court May 1, 1924, in the sum of \$20,752.58. Upon petition of defendant, filed May 28, 1924, this Court on June 9, 1924, granted its Writ of Certiorari to the Supreme Court of Minnesota.

March 9, 1925, plaintiff made in this Court a motion to dismiss the Writ of Certiorari on the ground that it was improvidently granted, or if such dismissal be not granted, the cause be advanced and placed on the summary docket. May 25, 1925, this Court ordered that consideration of the motion to dismiss be postponed until the hearing of the cause on the merits, but that it be advanced and set for hearing November 2, 1925, on the summary docket; since which time the case has been reset for November 30, 1925. Defendant has already filed two briefs in this Court, one accompanying its petition and one in opposition to plaintiff's motion to dismiss the writ. These briefs of necessity deal with the merits of the case and the rules of law relied upon by defendant; and the attention of the Court is respectfully called to them.

With respect to the saving by defendant of all its rights and contentions and taking appropriate exceptions and making appropriate assignments of error; the trial and each of the appeals are identical. Reference to pages 11, 352, 354, 382, 383, 384, 385, 386, 387, 389, 390, 391, 392, 393, 394, 395, 396,

397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 417, 418, 419, 420 of the Record will show that at every stage of the proceeding defendant has, by appropriate action, raised each and every one of the questions hereinafter stated and presented by its Specifications of Error.

We believe it will be helpful to a full understanding of the questions involved to make a brief

#### STATEMENT OF FACTS.

October 27, 1920, defendant's way freight No. 43 left Stevens Point, Wisconsin, for a regular trip westerly to Superior, Wisconsin, a distance of something more than 200 miles. At Owen, a point enroute, the train picked up an empty Lehigh Valley box car. The train continued to Ladysmith, Wisconsin, a division point, where the crew was changed. Among the new crew was plaintiff, acting as rear brakeman; he was a man 32 years of age, had been working as a brakeman for about 12 years, and had been over this route and the particular point here involved, many times. The train, as it left Ladysmith, consisted of 70 cars, the Lehigh Valley car being 30 cars ahead of the caboose and the fortieth behind the engine. The train progressed for about 70 miles to a point west of a station called Gordon and east of a station called Solon Springs. It was then about six o'clock in the afternoon. Up to that time there had been no trouble of any kind with the train, nor had anyone connected with it any knowledge of any bad order car in the train (R. 41, f. 77). After passing through Gordon without stop, the train had run about two miles westerly when it broke in two, the air hose parted setting the automatic brakes in emergency on both sections of the train. Darkness had come on and mixed rain and snow was falling.

Plaintiff went forward from his place in the caboose to ascertain the cause of the trouble; the conductor remained behind to protect the rear. Plaintiff found the train parted at such point that the front section consisted of 40 cars and the rear section of 30. The sections stood about 12 feet apart, the space between them being on the St. Croix River bridge. The rear car of the front section was the Lehigh Valley; the carrier iron on the rear (or easterly) end of this car was down on the right-hand (or northerly) side. The nut had come off of the bolt holding up that side of the carrier iron, which had allowed the drawbar to sag on that side sufficiently to uncouple that car from the one behind it. The sole bad order feature was the coming off of the nut from the lower end of the bolt on the right-hand side of the carrier iron (R. 55, f. 103).

Plaintiff testifies upon his direct examination as follows (R. 19 and 20, f. 37) :

“Q. When you found the coupler in that condition you may state whether or not the coupler was in such condition that you could couple up that train.

A. No, not unless I fixed it.

Q. What was your duty at that time as brakeman?

A. Repair it and get the train going.”

See also R. 10, f. 20; and R. 24, f. 46; and R. 25, f. 47.

From this point the facts are in dispute, but we state them in accordance with plaintiff's testimony. He testifies that the right-hand end of the carrier iron had swung around under the drawbar and nearly parallel to it; that his first act in making the repair was to pull this carrier iron around toward him to its proper position at right angles with the drawbar; that to do this he had to relieve the pressure on

the carrier iron by raising up the drawbar with his left knee; that he could not find the nut which belonged on the bolt; that he had a nut in his pocket and attempted to make use of that, but found it too large (R. 20, ff. 38 and 39); that the place of his work was about 20 feet from the westerly end of the bridge (R. 17, f. 32); that upon finding the nut too large, he walked out to the westerly end of the bridge and there found on the ground some wooden wedges, called shims; that he took back some of these and inserted them between the carrier iron and the drawbar thereby blocking up the drawbar so that the coupling would make (R. 21, ff. 40 and 41); that he then placed the couplers in alignment so they would couple; then closed the angle cock on the head section, climbed up on the top of the first car of the rear section and gave a back up signal with his lantern; which signal was relayed by the head brakeman who had come part way down from the engine; that in response to that signal the engineer backed up, the coupling made and plaintiff gave a stop signal which was relayed by the head brakeman and obeyed by the engineer (R. 21-23, ff. 41 and 44). The brakes being still locked on the rear section, plaintiff then descended, coupled up the air hose, opened the angle cock on each section, then climbed back on the first car behind the place of parting and gave a back up signal, his purpose being to take the train back into Gordon out of the way of a passenger train which was about due (R. 23, ff. 44 and 45). The train backed about 20 feet, then parted again at the same place, the air hose again separated and the brakes on each section set in emergency. The Lehigh Valley car was still upon the bridge and the space between it and the next car was from four to six feet (R. 24, ff. 45 and 46). Thereupon plaintiff descended from

the car from which he had given the signals and again undertook to make the necessary repairs upon the carrier iron. As before, he found the carrier iron swung around under the drawbar so that his first act was to pull it around to its position at right angles with the drawbar. As before, he placed his left knee under the drawbar, raised it, and attempted to pull the carrier iron around into place. The carrier iron seemed to stick by reason of the pressure of the drawbar upon it; he therefore braced himself, raised up more on the drawbar and gave a harder pull and with both hands, whereupon the carrier iron came around into place more quickly and easily than he anticipated. The hard pull, the position with his left knee under the drawbar and the unexpected coming around of the carrier iron caused him to lose his balance, and in endeavoring to regain it he fell over the northerly edge of the bridge. That there be no mistake as to the manner in which the accident occurred, we beg the indulgence of the Court to quote briefly from the Record. The statement in the complaint and repeated in the second Supreme Court opinion, that the carrier iron "gave way" is not correct; in the first opinion, 154 Minn., page 3, it is correct. At R. 24, f. 46, plaintiff testifies:

"Put my knee under the drawbar to help raise it up and got hold of the carrier iron to pull it back cross-ways underneath the drawbar and it stuck, wouldn't come; it was caught some way or other. The next time I kind of braced myself for a harder pull on it.

Q. On this last occasion, the harder pull, did you have one or both hands that time?

A. I had taken two hands then. And I raised up a little harder with my knee and give it a hard pull and it came easy. Caused me to step back down in be-

tween the ties.

Q. Which foot?

A. Right foot. Or the stringer somewhere, stepped back, lost my balance and I made a grab for the car and I missed it and went off backwards."

See also R. 62 and 63, ff. 117-19.

We call special attention to the fact that there was no movement or use, nor attempted movement or use, of the defective car, nor in fact of any part of the train from the time it stopped in emergency with the brakes set upon each section up to the time of plaintiff's fall. We quote plaintiff's testimony at R. 65, f. 123:

"Q. Well, did you feel any movement?

A. No, I did not.

Q. The rear section could not move, could it?

A. It couldn't move, no, sir.

Q. It could not move; the brakes were locked on it, so *there was no movement of either section?*

A. *No, sir.*"

See also R. 23; and R. 54, f. 102; and R. 61, f. 115; and R. 366, f. 694.

Plaintiff further testifies that he was in full charge of the train; that it could not be moved except upon his signal (R. 53, f. 100). The conductor was protecting the rear (R. 273, f. 521). The fireman protected the front (R. 267, f. 511). The head brakeman relayed plaintiff's signals (R. 204 and 205, ff. 393 and 394), which the engineer obeyed (R. 53, f. 100). Plaintiff was but 40 feet from the hard ground at the end of the bridge and states that he might have signalled the train ahead so as to do his work on the ground, instead of on the bridge (R. 61, ff. 115 and 116).

Plaintiff testified to the following necessary steps in the repair before the coupling could be made, viz. (R. 20, 21 and 22) :

1. Raise up the drawbar with his knee and pull the right-hand end of the carrier iron around into a position at right angles with the drawbar.

2. Get that end of the carrier iron over the bolt and put on a burr, or in lieu thereof get some shims from the ground at the end of the bridge and block up the drawbar to meet the coupler on the other car.

3. Push the drawbar over to the left as far as possible.

4. Open the knuckle on the other car and pull that drawbar over to the right.

5. Close the angle cock on the last car of the front section (the one on which he had worked) so that the engineer could pump up the air on that section and release the brakes.

6. Climb up on top of the first car of the rear section (which he calls the good car).

7. Give back up signal to the engineer.

8. The engineer would back the front section against the rear section and the coupling would make.

It conclusively appears from his testimony that while doing number one he was injured by losing his balance and falling off the bridge.

While we are mindful that plaintiff's version of the facts will be accepted by this Court as correct; in view of some of the specifications of error, it is necessary to say that the testimony of all the rest of the train crew, as well

as the physical facts, show that after the second parting plaintiff got the carrier iron in place and fastened; that he coupled the cars properly and coupled the air hose; that he then stepped out to the side of the train to signal its movement, but stepped too far out and off the edge of the bridge. Defendant maintains that the construction of the car was such that the testimony of the plaintiff as to the position of the carrier iron cannot be true, that such an occurrence was a physical impossibility. However, it is defendant's earnest contention that whether the version of the plaintiff be accepted as true or whether the version of the other witnesses and the physical facts be accepted as true, judgment herein has been awarded and affirmed against the defendant under an erroneous application of the law governing the Federal Acts.

#### THE QUESTIONS INVOLVED.

The questions raised and presented to the Minnesota Supreme Court and by it decided and which are here involved, are substantially these:

##### I.

Whether the law be as stated and held by the Minnesota Supreme Court in its first opinion, 154 Minn. 1; which holding it adheres to as the law of the case on the second appeal; viz. (Syllabus by the Court, 154 Minn. 1):

"1. The protection of the Federal Safety Appliance Act extends to a brakeman injured while engaged in repairing a defective coupler, which has caused an interstate train to break apart, the repair being made on the road in order that the train may be coupled together again and proceed on its way.

2. A recovery by a brakeman so engaged, who was injured by falling from a bridge upon which the break in the train occurred, cannot be defeated on the ground that there was no causal relation between the failure to comply with the statute and the ensuing injury, nor on the ground that such an accident was so improbable that it could not reasonably be foreseen."

Said question is raised by defendant's demurrer to the complaint (R. 3); objection to testimony under the complaint and opening statement (R. 11); motion for directed verdict (R. 353-5); assignment of error on motion for judgment (R. 389 and 90); assignment of error on appeal (R. 398 and 399; and R. 417-19).

## II.

Whether the law be as stated and held by the Minnesota Supreme Court in the body of its first opinion, 154 Minn., pages 4 and 5; and which holding it repeats and adheres to as the law of the case upon the second appeal; viz.:

"1. Defendant insists that its motion for judgment should have been granted because the automatic coupler provisions of the Federal Safety Appliance Act apply only where a car is moved for the purpose of coupling and uncoupling it, and that they do not apply if the injury results from an attempt to repair a defective coupler on a motionless car. We do not stop to inquire whether this is a correct interpretation of the Act. The conditions were such that the coupling could not be made automatically by impact. If plaintiff was attempting to bring the drawbar back to its proper position so the coupling could be made, we think the

protection of the Act extended to him while he was so engaged. *L. & N. R. Co. vs. Layton*, 243 U. S. 617, 37 Supreme Court 456, 61 Lawyer's Edition 931, followed in *Clapper vs. Dickinson*, 137 Minn. 415, 163 N. W. 752."

This question is raised by objection to testimony under the complaint and opening statement (R. 11); motion for a directed verdict (R. 354); defendant's requested instruction No. II (R. 384); assignment of error on motion for judgment (R. 389); assignment of error on appeal (R. 399; and R. 417-19).

### III.

Whether the law be as held and stated by the Minnesota Supreme Court in the body of its first opinion, 154 Minn. 5, and which holding it repeats and adheres to as the law of the case upon the second appeal; viz.:

"2. Assuming that the accident happened in the manner described by plaintiff, can it be said the violation of the Act is the proximate cause of his injury? We think the question requires an affirmative answer. It matters little whether he was attempting to make the coupling or right the position of the drawbar so the coupling could be made automatically by impact. In either case, the chain of events extended uninterruptedly from the defective appliance to the injury, and there was the direct causal relation which the law requires. *Eric R. Co. vs. Russell*, 183 Fed. 722, 106 C. C. A. 160; S. C. 220 U. S. 607, 31 Sup. Ct. 722, 55 L. ed. 607; *Louisville & N. R. Co. vs. Layton*, *supra*; *Pounds v. Chicago G. W. R. Co.*, 114 Minn. 312, 131 N. W. 329; *Burho vs. Minneapolis & St. L. R. Co.*, 121

Minn. 326, 141 N. W. 300. Neither can it be said that such an accident as this was so improbable that it could not reasonably be foreseen. There are bridges on all railroads and a defective coupler may cause a train to break in two anywhere and at any time. The facts bring the case within the rule as to foreseeable consequences. See *Christianson vs. Chicago, St. P. M. & O. Ry. Co.*, 67 Minn. 94, 69 N. W. 640; *Foss vs. Chicago, B. & Q. Ry. Co.*, 151 Minn. 506, 187 N. W. 609. If plaintiff's testimony is true, and it was for the jury to determine whether it was, there was no error in the denial of defendant's motion for judgment notwithstanding the verdict."

This question is raised by objection to testimony under the complaint and opening statement (R. 11); motion for a directed verdict (R. 354); defendant's requested instruction No. II (R. 384); assignment of error on motion for judgment (R. 389); assignment of error on appeal (R. 399; and R. 417-19).

#### IV.

Whether the law be as stated and held by the Minnesota Supreme Court in its first opinion, 154 Minn. 7, and which holding it adheres to as the law of the case upon the second appeal, viz.: the approving of an instruction by the trial court to the jury that if "they (the jury) found that in the performance of his duties plaintiff necessarily went between the cars and there engaged in the work of repairing the coupler, and while so engaged slipped or fell from the bridge, the verdict must be in his favor"; and further holding in substance that if the plaintiff was not repairing the coupling apparatus when he fell he could not recover, but

that if he was repairing the coupling apparatus when he fell he could recover.

Said question is raised by defendant's demurrer to the complaint (R. 3); objection to testimony under the complaint and opening statement (R. 11); motion for a directed verdict (R. 354); assignment of error on motion (R. 389-90); assignment of error on appeal (R. 398-9; and R. 417-19).

## V.

Whether the law be as held and stated by the Minnesota Supreme Court in its second opinion, 159 Minn. 41, viz. (Syllabus by the Court):

"2. There being nothing inconsistent in *Davis vs. Wolfe*, 263 U. S. 239, decided by the Supreme Court of the United States since the opinion in the former appeal herein was filed and relied on as precluding a recovery, the law of the case as announced in our former opinion should be applied and accordingly the question whether the defective coupler was the proximate cause of plaintiff's injury was properly left to the jury."

Said question is raised by defendant's demurrer to the complaint (R. 3); objection to testimony under the complaint and opening statement (R. 11); motion for a directed verdict (R. 354); assignment of error on motion (R. 389-90); assignment of error on appeal (R. 398-9; and R. 417-19).

## VI.

Whether the law be as held and stated by the Minnesota Supreme Court in the body of its second opinion, 159 Minn. 43, 44, viz.:

"The carrier iron is unquestionably part of the coupling device. \* \* \* Plaintiff's duty was to couple up the parted train and that speedily. To that end emergency repairs must be made so that the defective coupler would receive or fit into the one from which it parted. \* \* \* Plaintiff had to prepare the coupler so it would couple onto the other car. He was not a repair man. Emergency repairs, which, at times, he, as brakeman, was called to do in order to couple up trains that break in two in transit, should not place him in the class of ordinary repair men doing their work with proper tools, appliances and protection. Here the defective coupler caused plaintiff to go between the cars and attempt to put it in condition to couple, and in that attempt he was injured. Under the circumstances he was actually engaged in a coupling operation."

Said question is raised by defendant's demurrer to the complaint (R. 3); objection to testimony under the complaint and opening statement (R. 11); motion for a directed verdict (R. 354); assignment of error on motion (R. 389-90); assignment of error on appeal (R. 398-9; and R. 417-19).

## VII.

Whether the law be as held and stated by the Minnesota Supreme Court in its second opinion, 159 Minn. 45 and 46, viz.:

"It seems to us that in the instant case the defective coupler may be said to be the cause, for the very attempt to prepare it for immediate coupling up and movement of the train, directly caused plaintiff's fall.

\* \* \* We are still of the opinion that if plaintiff's story was true, and the jury so found, the verdict finding the defective coupler the proximate cause of the injury was justified, and that nothing has been stated by the Supreme Court of the United States since our former decision to warrant us in disregarding the binding effect of that (the jury's) decision."

### VIII.

Whether the Amendment of April 14, 1910, Chapter 160, Section 4, requiring the making of emergency repairs on the spot upon coupling equipment becoming defective while in use, is not rendered nugatory by holding that the making of such repairs is a violation of Section 2 of the original Act.

Said question is raised by defendant's demurrer to the complaint (R. 3); objection to testimony under the complaint and opening statement (R. 11); motion for a directed verdict (R. 354); assignment of error on motion (R. 389-90); assignment of error on appeal (R. 398-9; and R. 417-19).

### IX.

Whether plaintiff's counsel had the right to state to the jury that it was the law of the case that even though they found that plaintiff fell from the bridge after the train was fully coupled together and standing still, as claimed by defendant, plaintiff nevertheless had a cause of action under the Federal Safety Appliance Act if he stepped off the bridge while giving a signal for the train to back up, provided plaintiff's purpose was to test the coupling instead of proceeding on the road.

Said question is raised by exception at the time said language was used and a request that the jury be admonished to disregard it, which request was refused (R. 364, f. 691); by assignment of error upon the motion for a new trial (R. 395, f. 750); by assignment of error in Supreme Court (R. 401, ff. 761-2); by assignment of error in Supreme Court (R. 407, f. 772).

### X.

Whether plaintiff's fall and injury were due to risks and hazards which he knowingly and voluntarily assumed.

Said question is raised by defendant's seventh ground for a directed verdict (R. 354); requested instruction No. X (R. 385); assignment of error on motion for judgment or a new trial (w) (R. 394); assignment of error XII in Supreme Court (R. 400); and XXXIX (R. 405); and assignment XVIII in Supreme Court (R. 420).

### XI.

Whether plaintiff's fall and injury were due solely to his own negligence; or solely to his own acts, whether negligent or not.

Said question is raised by defendant's sixth ground for a directed verdict (R. 354); requested instruction XVI (R. 386); assignment of error No. VI on motion for judgment or new trial (R. 390), and (y) (R. 394); assignment of error XI in Supreme Court (R. 400); and XLI (R. 406); assignment of error XVII in Supreme Court (R. 419).

### SPECIFICATIONS OF ERROR.

We consolidate and somewhat abridge the specifications in our petition for the writ of certiorari in order that the

specifications may conform as nearly as practicable to the statement of the questions involved. The substance of the specifications will be found identical with those in the petition.

1. Error in permitting recovery herein solely upon rights asserted under the Federal Employers' Liability Act, April 22, 1908, c. 149, 35 Stat. 65; as amended April 5, 1910, c. 143, 36 Stat. 291; in connection with the Federal Safety Appliance Act, March 2, 1893, c. 196, 27 Stat. 531; April 1, 1896, c. 87, 29 Stat. 85; March 2, 1903, c. 976, 32 Stat. 943; April 14, 1910, c. 160; 36 Stat. 298; such recovery being allowed upon the wholly erroneous holding that there was a violation of the Safety Appliance Act in operation at the time of plaintiff's fall and injury.

2. Error in so construing the Federal Safety Appliance Act as to render nugatory the Amendment of April 14, 1910, Chapter 160, Section 4, which expressly requires the making on the spot of emergency repairs upon automatic coupling equipment becoming defective while in use; and in holding that an attempt to repair such defective condition at the point where such defect arose is a violation of the original Act.

3. Error in holding that a fall from a bridge caused by loss of balance while making repairs upon a defective carrier iron, without use or attempted use of the coupling equipment, is within the evils against which the Federal Safety Appliance Act is directed; the use of such car being temporarily suspended and said car standing motionless on the track.

4. Error in holding that the defective condition of the carrier iron which supported the drawbar was the proxi-

mate cause of plaintiff's fall from the bridge, and that there was causal relation between the separation of the couplers and plaintiff's fall, such fall occurring an appreciable time after the separation of the couplers and the cars had come to rest; and in refusing to hold that such defective condition was in fact only an incidental condition or situation presenting the occasion for plaintiff being where he was in making repairs upon a car of which there was neither use nor attempted use.

5. Error in holding that plaintiff was engaged in a coupling operation at the time of his fall from the bridge; and in holding that mere intention to couple onto the car after the coupling apparatus had been repaired constituted the act of repairing a coupling operation.

6. Error in denying defendant's motion for a directed verdict and for judgment notwithstanding the verdict, made upon the ground that the evidence conclusively shows that plaintiff assumed all risks incident to doing his work upon the bridge in the manner he did it, and that his fall and injury arose solely from the risks so assumed.

In connection with this specification defendant assigns error in the refusal of the Court to give to the jury defendant's requested instruction No. X (R. 385), which requested instruction is in the following language:

"I charge you that the plaintiff assumed all known and obvious risks of his employment including the risk of doing his work upon the bridge, since he knew he was upon the bridge and that it was not guarded nor lighted, and if you find that his fall and resulting injury arose solely from his being upon the bridge and doing his work thereon, then your verdict must be for the defendant."

7. Error in denying defendant's motion for a directed verdict and for a judgment notwithstanding the verdict made upon the ground that it appears from the undisputed facts that plaintiff was guilty of negligence in not selecting a suitable place to do the work of repairing the defective carrier iron and chose to make such repair in a hazardous place; and that, under the circumstances, his own acts, whether negligent or not, were the sole proximate and moving cause of his fall and injury.

In connection with this specification defendant assigns error in the refusal of the Court to give to the jury defendant's requested instruction No. XVI (R. 386), which requested instruction is in the following language:

"The plaintiff's testimony shows that the portion of the car on which the carrier iron had become loose was but a short distance from the natural ground at the north (west) end of the bridge. It was the duty of the plaintiff to repair the carrier iron and to do so in a reasonably safe place and with due regard for his own safety. Unless you find from the testimony that there was some obstacle to his doing so, it was plaintiff's duty for his own safety to signal the moving of such car to a place where the fall of which he complains would not have happened. As a matter of law I charge you that if you find he could have readily signalled so as to move said car to a place of safety in order to perform the work on the car which he contemplated, it was his duty to see that the train was moved so that the car would be in a reasonably safe place to work, and if you find that he failed to take such precaution, his injuries are due entirely to his own negligence and you must find a verdict for the defendant."

8. Error in holding that plaintiff's counsel had the right to state to the jury in his closing argument that even though they found that plaintiff fell from the bridge after the train was fully coupled together and standing still, as claimed by defendant, plaintiff nevertheless had a cause of action under the Federal Safety Appliance Act if he stepped off the bridge while giving a signal for the train to back up; provided plaintiff's purpose was to test the coupling instead of proceeding on the road.

#### SUMMARY OF THE ARGUMENT.

1. There was no violation of the Safety Appliance Act in operation at the time of plaintiff's fall.

(a) Violation inheres in hauling or use of the car in a defective condition; there was neither hauling nor use after the defective condition arose.

(b) Hauling or use of a car which is likely to become defective is not a violation.

(c) Mere possession of a car in a motionless condition, even though defective, is not a violation.

(d) If the separation of the couplers be called a violation; still, such separation did not injure plaintiff.

(e) Repairing, readjusting, or replacing in position the defective drawbar was not a violation.

2. To hold that repairing defective coupling equipment is a violation of the statute is to render nugatory the Amendment of April 14, 1910, Chapter 160, Section 4.

(a) Under the original statute emergency repairs were not prohibited.

(b) The amendment requires that emergency repairs be made on the spot if reasonably possible.

(c) The same act cannot constitute both observance of the law and its breach.

(d) It is erroneous to hold that a repairman could not recover under the circumstances disclosed, but that plaintiff can recover because he was a brakeman. The statute makes no such distinction between persons.

*Johnson vs. G. N. R. Co.*, 178 Fed. 643, 647.

*Keenan vs. Dir. Gen'l*, 285 Fed. 286.

(e) Defendant could not be penalized under the Act for what plaintiff was doing when he fell.

3. A fall from a bridge, caused by loss of balance while repairing defective coupling equipment on a motionless car, is not within the evils against which the Safety Appliance Act is directed.

(a) Injury through the agency of defective coupling equipment when not in present use for coupling purposes is not within the Act.

*St. L. & S. F. R. Co. vs. Conarty*, 238 U. S. 243.

*Lang vs. N. Y. C. R. Co.*, 255 U. S. 455.

*McCalmont vs. Penna. R. Co.*, 283 Fed. 736.

(b) The only evils against which the Act is directed are:

(1) An intended impact or separation, participated in by the injured employe whose presence between moving cars is proximately caused by defective coupling equipment.

*St. L. & I. M. R. Co. vs. Taylor*, 210 U. S. 281.

*Johnson vs. S. P. Co.*, 196 U. S. 1.

*G. N. R. Co. vs. Otos*, 239 U. S. 349.

*Delk vs. St. L. & S. F. R. Co.*, 220 U. S. 580, 583.

*Ahrens vs. C. M. & St. P. R. Co.*, 121 Minn. 335.

*Burho vs. M. & St. L. R. Co.*, 121 Minn. 326.

*Sprague vs. Wis. Cent. R. Co.*, 104 Minn. 58

*Pounds vs. C. G. W. R. Co.*, 114 Minn. 312.

(2) An intended or unintended impact or separation, not participated in by the injured employe, but whose presence between the cars is proximately caused by defective coupling equipment.

*Erie R. Co. vs. Russell*, 183 Fed. 722.

*C. M. & St. P. R. Co. vs. Voelker*, 129 Fed. 522.

*Chic. Junc't R. Co. vs. King*, 222 U. S. 222.

(3) An unintended impact or separation proximately caused by defective coupling equipment and which impact or separation in turn proximately causes the injury.

*M. & St. L. R. vs. Gottschall*, 244 U. S. 66.

*L. & N. R. R. Co. vs. Layton*, 243 U. S. 617.

*Erie R. Co. vs. Caldwell*, 264 Fed. 947.

*P. & R. R. Co. vs. Eisenhart*, 280 Fed. 271.

*Clapper vs. Dickinson, Receiver*, 137 Minn. 415.

*Keenan vs. Dir. Gen'l*, 285 Fed. 286.

(4) A use or hauling of the car while in an actually defective condition, the condition directly and proximately contributing to the injury.

*C. G. W. R. Co. vs. Schendel*, 267 U. S. 287.

*C. R. I. & P. R. Co. vs. Brown*, 229 U. S. 317.

4. The defective condition of the coupling equipment was not the proximate cause of plaintiff's fall from the bridge.

(a) There was no causal relation between the separation of the couplers and plaintiff's fall, such fall occurring an appreciable time after the separation and after the cars had come to rest.

(b) Separation of the couplers merely created an incidental condition or situation in which the accident, otherwise caused, resulted in injury.

(c) Failure of the coupling apparatus created only a condition reflecting itself in the general physical situation in which plaintiff was injured by acts of his own.

(d) Plaintiff's force and his failure to preserve his balance were intervening forces which broke the causal chain (if any existed) between the separation of the cars and his fall.

*G. N. R. Co. vs. Wiles*, 240 U. S. 445.

*Douglas vs. Wash. Ter. Co.*, 298 Fed. 199, 202.

*Davis vs. Hand*, 290 Fed. 73, 77.

(e) The first active force, viz., separation of the cars, was remote from plaintiff's fall.

*Lanz v. Penna. R. Co.*, 281 Fed. 796, 798.

5 and 8. The statement that plaintiff was actually engaged in a coupling operation at the time of his fall is wholly unsupported by the Record; in fact the Record shows the contrary.

(a) Plaintiff's own allegation, and his corresponding proof, is that he was engaged solely in repairing, readjusting and replacing in position, the defective drawbar.

(b) The holding in the first opinion of the Minnesota Supreme Court is that plaintiff was engaged in making repairs; the evidence upon the second trial is unchanged.

(c) Seven distinct steps were necessary before any coupling operation could begin.

(d) Repairing of the coupling equipment cannot be extended to the act of coupling the cars.

(e) Inaction plus intention does not equal action.

(f) Whether plaintiff's acts constituted a coupling opera-

tion, the facts being assumed correct, is a question of law which this Court will determine for itself.

6. The action not being within the Safety Appliance Act, assumption of risk is available as a defense.

(a) Plaintiff assumed the risk of doing his work upon the bridge and the method of its performance.

7. It must be held that plaintiff's own acts, whether negligent or not, were the sole cause of his injury and a verdict should have been directed for the defendant.

*B. & O. vs. Tittle*, 4 Fed. (2nd) 818, distinguished.

## ARGUMENT.

### SPECIFICATION NUMBER ONE.

There was error in permitting any recovery under the Federal Employers' Liability Act based upon violation of the Federal Safety Appliance Act. To sustain recovery there must be a violation of the Act operating directly to cause the accident which results in injury.

*Davis vs. Wolfe*, 263 U. S. 239.

*McCalmont vs. Penna. R. Co.*, 283 Fed. 736; certiorari denied 260 U. S. 751.

*St. L. & S. F. R. Co. vs. Conarty*, 238 U. S. 243.

*G. N. Ry. Co. vs. Wiles*, 240 U. S. 444.

*Lang vs. N. Y. C. R. Co.*, 255 U. S. 455.

*F. W. & D. C. R. Co. vs. Smithers* (1923 Tex.), 249 S. W. 286.

*Phillips vs. Penna. R. Co.*, 283 Fed. 381; certiorari denied, 260 U. S. 731.

*Davis vs. Hand*, 290 Fed. 73, 76; certiorari denied, 263 U. S. 705.

*P. & R. R. Co. vs. Eishhart*, 280 Fed. 271; certiorari denied, 260 U. S. 723.

The Statute is one interdicting *operation*, not one interdicting *possession*. It is made unlawful to "haul or permit to be hauled or used any car not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Here it is undisputed that simultaneously with the failure of the coupling to operate automatically, the movement and use of the car automatically ceased. If the separation of the couplers be regarded as a violation of the Statute as in *M. & St. L. R. Co. vs. Gottschall*, 244 U. S. 66, the complete answer is that such separation did not injure plaintiff, nor did it put in motion any force which continued in operation to cause his subsequent fall from the bridge. When the first separation occurred, plaintiff was in a place of safety in the caboose. He went forward to the place of the trouble, succeeded in remedying the condition, got on top of the first car of the rear section, signalled a back up and the coupling made. He descended from the car, coupled the air hose and opened the angle cocks, then returned to his position on top of the car where he gave a back up signal. The train backed about 20 feet, then parted again. If this second separation be called a violation, it is met by the same answer, viz.: *that such separation did not injure plaintiff*. He was in a place of safety on the top of the car; he says at the second separation he braced himself for a jolt, but there wasn't any (R. 61, f. 115). He then descended, found the cars standing with the couplers about four feet apart, the ends of the cars about six feet apart. He then proceeded with the first step in making the repair.

It is admitted that the brakes were locked upon each section of the train, that the cars were as motionless as though frozen in place. They so remained until a considerable time after his fall and until they were moved in response to signals by other members of the crew. It must be admitted that no act of uncoupling or coupling or hauling was in operation at the time of plaintiff's fall. It would seem immaterial whether the cars stood in their motionless situation five minutes or five hours or five days. There was no more of a coupling operation in progress (in fact not so nearly an approach to it) as in the Conarty and Lang cases.

In *Delk vs. St. L. & S. F. R. Co.*, 220 U. S. 580, this court says:

*"After the coupler became defective and could not be coupled without going between the ends of the cars, it became unlawful for the railroad company to haul it, or permit it to be hauled or used on its line. It then became the duty of the railroad company to withdraw the car from use and have it repaired to conform with the law before using it further. It did not do this but continued to use the car in its defective condition."*

It is submitted that in the instant case, after the car became defective, defendant did refrain from using it and endeavored to have it repaired before using it further. It was while making this repair that plaintiff was injured; not from the failure of the coupler to work automatically, but from the method, place and manner chosen by plaintiff to do the work.

The opinion of the Minnesota Supreme Court recognizes that there could not be a coupling operation in progress at the time of plaintiff's fall, for it says:

"The conditions were such that a coupling *could not be made* automatically by impact."

We have shown in the Statement of Facts, seven successive steps that must occur before a coupling operation could be begun. It seems to us that the Minnesota Supreme Court overlooks the most important question in the case when it says:

"We do not stop to inquire whether the Safety Appliance Act applies if the injury results from an attempt to repair a defective coupler on a motionless car."

But why not stop to inquire? This was admittedly the situation. It was necessary to inquire in order to correctly decide the case. Let it be noted that the Court does not find that there was a violation of the Act operating at the time of plaintiff's injury, it merely says:

"If plaintiff was attempting to bring the drawbar back to its proper position so that the coupling could be made, we think the protection of the Act extended to him while he was so engaged."

What protection of the Act? Manifestly the meaning should be protection from injury *caused by violation of the Act*. But *there was no violation of the Act*. It is admitted that the cars were at rest. It is not shown that defendant then put in motion any force which resulted in injury to plaintiff. It would seem that a vital step in the logical sequence is omitted in the reasoning and that the conclusion of the Court was reached by the following process:

(a) Had plaintiff been injured by a violation of the Act while he was engaged in making the repair, he might recover under the Act.

(b) He was injured, while so engaged, by losing his balance and falling off a bridge.

Ergo—there was a violation of the Act.

With great respect to the Minnesota Supreme Court, this does not seem sound legal reasoning.

In his argument to the jury and before the Minnesota Supreme Court, plaintiff laid great stress upon the bad condition in which the coupling apparatus was found on its final arrival at Superior October 29th, 1920, two days after the accident. But it is shown that the car was automatically coupled into the train at Owen, that it was shifted at Ladysmith, that it served through two more stops, that up to the moment of the separation it functioned properly (R. 246). Plaintiff assumes, contrary to the facts, that the car was in a "deplorable condition," when it was put into the train at Owen on the morning of October 27th; and that "what happened when the train finally parted was simply a culmination of the growth of the defective condition of the coupler in question." Counsel's position on this point is set out at R. 356-7. This argument proved effective to the jury and to the State Supreme Court and that Court is ultimately forced to hold that possession and use of a car on which the coupling apparatus *is likely to become defective in use* is a violation of the Safety Appliance Act. This is not the law. As is well stated in the McCalmont case, 273 Fed. 231:

"Obviously, cars have to be equipped somewhere with safety appliances. Obviously if they are once equipped and get out of repair they must be repaired somewhere. It could not be contemplated that cars could be either constructed or equipped in such a manner as never to become defective or insecure or out of repair. \* \* \* It

is only when the use is in connection with the movement or hauling of the car in the forbidden manner that the Safety Appliance Act can be said to apply."

The Minnesota Supreme Court lays stress upon *Erie R. Co. vs. Russell*, 183 Fed. 722. But Russell was injured by an actual act of coupling, though it was premature and unexpected; and he was injured while in the very situation and by the very dangers against which the Safety Appliance Act was designated to guard. The Minnesota Supreme Court fails to take into account that in the Russell case a violation of the statute might be said to be in actual operation and caused Russell's injury. Whether the act of coupling or uncoupling be intended or not, still if it is taking place with defective appliances injury thereby occasioned is within the Act. But here, no *operation* was in progress and the Minnesota Supreme Court does not point out, nor can it point out, in what the violation of the Statute consisted or in what manner such assumed violation injured plaintiff. It in effect holds that possession of a car *which is likely to become* defective is a violation of the statute. If it does not mean that, then there can be but one other meaning, viz.: that after a defect actually arises, possession alone is violation and the carrier is liable for any injury occurring *from any cause* while such defective condition exists. This is a violation of the principle announced in *Davis vs. Wolfe*, where this Court says that there cannot be recovery "if the violation of the statute merely creates an incidental condition or situation in which the accident *otherwise caused*, results in injury."

If possession of a defective car is a violation of the statute and if one injured by reason of such possession (without use) may recover, then the Conarty and Lang cases are

wrongly decided. So also was the Wiles case. But this Court held in all those cases that even in the presence of the entire setting caused by the defective condition, still if not operative at the time of the injury, recovery will be denied. The Minnesota Supreme Court apparently attaches importance to the fact that plaintiff was obliged to be between the cars. *But this did not injure him.* The ties of the bridge were 12 feet long. When plaintiff stationed himself between the cars he had substantially six feet on each side. Instead of being injured by reason of being between the cars, it may be said with accuracy that such position was the safest place for him and had he remained between the cars he could not have been injured in the manner he was. It is argued that the conditions were such that he was compelled to go between the cars. But the allegation and proof is that this was for the purpose of making the repairs. It is not claimed that it was necessary to go between the cars in order to couple them after the repairs were completed. The position then would be on top of the other car. So far as the "between the cars" provision is concerned it has to do with the perils arising from being between the cars for the purpose of coupling or uncoupling or in connection with hauling, and while one of those operations is going on. A very well reasoned state case along exactly these lines is *Weiss vs. Belt R. Co.*, 186 Ill. App. 43, 48-50; and recovery was there denied under much stronger circumstances than those obtaining here.

We do not contend that plaintiff must show that *he* was coupling or uncoupling; we do contend that some operation of coupling or uncoupling or hauling, or force directly engendered thereby, must be in actual operation simultaneously with and directly causing, the accident resulting in the injury. Every case which has been here cited by plain-

tiff establishes this principle and nothing more. Not one sustains the contention he makes in this case.

We may add that if the intention was to hold that possession of a car with a defective safety appliance is a violation of the Act, the Supreme Court of Minnesota has squarely reversed that holding in a case arising subsequently to the one at bar. See *Bohm vs. C. M. & St. P. R. Co.*, 200 N. W. (Minn.) 804, decision filed Nov. 21, 1924. Certiorari denied by this Court March 9, 1925.

#### SPECIFICATION NUMBER TWO.

If the Minnesota Supreme Court does not mean that possession alone constitutes a violation of the statute; then there is no escape from the conclusion that it means that the repair itself constituted a violation. But such construction renders nugatory the provisions of the Amendment of April 14, 1910, Chapter 160, Section 4, which not only permits, but requires, that coupling apparatus becoming defective while in use be repaired where the equipment is first discovered to be defective or insecure.

The Act of 1893 penalized *any* use or hauling of a car with a defective coupler. It took no cognizance of the likelihood of defects arising in transit. Adhering to the letter of the law, the courts almost uniformly penalized even the necessary hauling to a repair point. *Eric R. Co. vs. U. S.*, 240 Fed. 28. One Court rebelled at this narrow construction; held that the Act should be reasonably construed, and refused to require the abandonment of a car becoming defective while in use. *Seigal vs. N. Y. C.*, 178 Fed. 873. Presumably in the light of these holdings, Congress enacted the Amendment of April 14, 1910, as follows:

"Provided, that where any car shall have been prop-

erly equipped, as provided in this Act, and the other Acts mentioned herein, *and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad*, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by Section four of this Act or Section six of the Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, *if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point*; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this Section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employe caused to such employe by reason of or in connection with the *movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this Act and the other Acts herein referred to.*"

Construing and applying this amendment the Circuit Court of Appeals of the 7th Circuit in *Chicago Jct. R. Co. vs. King*, 169 Fed. 372 (its decision being approved by this Court in 222 U. S. 222), holds that where a car having a broken coupler could reasonably have been repaired *where it stood*, the mere fact that it could be repaired more conveniently at another place did not justify its being moved in its defective condition. At page 376 the Circuit Court distinctly holds that "the movement of the car was unlawful

because the jury were justified in finding that it was reasonably practical to make the repairs without moving the car."

In *Lorick vs. S. A. L. R. Co.*, 108 S. C. 100, the Supreme Court of South Carolina says:

"It is the law of the Federal Statute that such repairs must be made on the spot."

And in *Flack vs. A. T. & S. F. R. Co.*, 285 Mo. 28 (in which this court denied writ of certiorari, 256 U. S. 690), the Supreme Court of Missouri says:

"The engine was undeniably being prepared for use in interstate traffic, and the deceased met his death while engaged in that preparation. The work then being done was necessary in order to avoid a violation of the provisions of the Act, whose penalties respondent now invokes. For all of these reasons, this suggestion can avail respondent nothing."

And this court says in *U. S. vs. Eric R. Co.*, 237 U. S. 402:

"While Section 4 of the Act of 1910 permits such cars to be hauled, without liability for the statutory penalty, from the place where the defects are discovered to the nearest available point for making repairs, *it distinctly excludes from this permission all cars which can be repaired at the place where they are found to be defective.*"

In *U. S. vs. A. T. & S. F. R. Co.*, 167 Fed. 696, the U. S. District Court, construing the amendment, holds:

"Carriers are required immediately to repair defects of cars caused during the time they are being hauled if they can do so with the means and appliances at

hand at the time and place, or when such condition should have been discovered by the exercise of reasonable care. If requisite means are not at hand, carriers have the right without incurring the penalty of the law, to haul the defective car to the nearest repair point."

And in *U. S. vs. A. T. & S. F. R. Co.*, 220 Fed. 215, 217, the U. S. District Court, construing this amendment, says:

"The sole question in the case \* \* \* is whether or not, upon the discovery of an inhibited defect in the equipment of a car, the common carrier may haul the car in the usual and ordinary way from the place where the defect is first discovered to the nearest place where such repairs as are necessary, because of the existence of such defect, are usually and ordinarily made, in spite of the fact that with but little, if any, inconvenience or interference with the practical operation of the carrier's business, such repair could have been made *upon the ground* and without any necessity of moving the car or subjecting employes of the carrier to risk of injury."

In the instant case after the drawbar dropped, violation of the statute would have consisted in moving the car or moving another car upon it. If possible to repair it without movement that was plaintiff's duty. Plaintiff, both in his complaint and in his testimony, recognizes this for he expressly alleges, and testifies, that it was his duty to repair the coupling apparatus, and to repair it where the car stood, to-wit: upon the bridge. But, he then takes the position that this was a violation of the statute and maintains that his compliance with his duty and with the law constitutes a *violation* of the law. Manifestly, if not to repair on the spot is a violation of the statute, making the repair can-

not also be a violation. The same act cannot constitute both observance of the law and its breach. Surely, it cannot be the Congressional intent that if the carrier fails to repair before moving the car it does so at its peril; and in the same breath provide that if the carrier makes the repair it does that also at its peril. Plaintiff's contention, in which he has succeeded in getting the Supreme Court of Minnesota to agree, is that the carrier violates if it does not and also violates if it does. Such reasoning can logically lead to but one conclusion, viz.—that when a defect in coupling equipment arises in operation, the carrier must abandon the car where it stands. It cannot move the car because so doing will violate the statute; it cannot repair it because so doing will violate the statute. The holding comes simply to this: that if the person making the repair is injured *from any cause* he is within the statute and may recover. Thus, contrary to the express holding of this Court in the McWhirter case, the carrier is made an insurer. It seems to us that plaintiff is in no different situation than though he had caught his hand between the carrier iron and the edge of the coupler and thereby sustained injury, or had fallen down and bumped his head upon the rail instead of falling off a bridge. The Minnesota Supreme Court says: "There are bridges on all railroads." True—and it may also be said that there are rails and ties on all railroads, but we doubt that even the Minnesota Supreme Court would hold that had this man struck his head upon the rail or upon a tie, instead of falling from a bridge, recovery could be had. Importance is apparently attached to the fact that he was pulling upon the carrier iron which supported the drawbar. That fact can have no significance. He was in no manner using the apparatus *as a coupler*. So far as his being in contact with the appliance is concerned, he may

as well have been pulling upon a hot box or a car door. There was no manner in which he could repair the coupling apparatus without coming in contact with it.

It seems to us that it would be contrary to public policy to hold that repairs cannot be made, where reasonably possible, at the point where the defect arises. If the holding of the Minnesota Supreme Court is correct as applied to freight trains, it is likewise correct as applied to passenger trains. The very argument made in behalf of plaintiff is that this defect should have been repaired, because to neglect it would endanger life and property. Much more would the same be true to passenger trains. The only reason advanced for claiming that the repair in this case was a violation of the law is because the repair was not made sooner and because it was not made by some person other than the plaintiff. It was an emergency repair, one of the most common arising on the road and one which trainmen may readily make. It appears in this case that the conductor, after plaintiff's accident, easily and quickly made the repair. But counsel for plaintiff in his argument to the jury (R. 358) made this statement:

"They (Congress) passed a law in 1893 \* \* \* requiring companies to have upon their cars couplers that would couple and uncouple automatically without the necessity of the brakeman or employe going between the cars for the purpose of making such coupling or uncoupling or for the purpose of repairing and fixing a defective coupler so it would couple, *when the repairing is done by other than car repairmen*. That is the purpose of the law. The law requires the railroad company to see to it at their peril that that coupler is always right; always right."

The Supreme Court of Minnesota approves this language and says, 159 Minn. 44:

"He (plaintiff) was not a repairman. Emergency repairs which, at times, he as brakeman was called to do in order to couple trains that break in two in transit, should not place him in the class of ordinary repairmen doing their work with proper tools, appliances and protection."

If this is the law, then, had a repairman been present, and called upon to do this work, fallen from the bridge exactly as did plaintiff, the repairman would be denied recovery. Nothing in the law gives warrant for making this distinction between persons. Section 8 says "*any employe*"; and we submit that since it is conceded that a repairman could not have recovered under the circumstances, neither can plaintiff recover from the mere fact that he was a brakeman. The law does not consider the particular line in which the person is employed generally, it considers only the character of the work being done at the time.

*Johnson vs. G. N. R. Co.*, 178 Fed. 643, 647.

*Keenan vs. Dir. Gen'l*, 285 Fed. 286.

A pertinent inquiry is, could the Government recover from defendant a penalty for what plaintiff was doing at the time of his injury? Clearly not. Defendant was observing the law, not violating it. Yet this Court says, in *C. B. & Q. R. Co. vs. U. S.*, 220 U. S. 559, 577:

"Indeed a survey of the entire statute leaves no room to doubt that all violations are put in the same category, and that whatever would be deemed a violation in an action to recover for personal injury is to be deemed a violation in an action to recover a penalty."

The amendment clearly authorizes repairs on the spot which it would not have done had Congress intended such repairs to be a violation. Also it may be suggested that had such repairs been contemplated as a violation, they would have been put in the exception with "hauling" in the latter portion.

### SPECIFICATION NUMBER THREE.

A fall from a bridge caused by loss of balance while repairing defective coupling equipment is not within the evils against which the Safety Appliance Act is directed; the use of such car being temporarily suspended and standing motionless upon the track. In *St. L. & S. F. R. Co. vs. Conarty*, 238 U. S. 243, 250, this Court says:

"It is very plain that the evils against which these provisions are directed are those which attended the old fashioned link and pin coupling, where it was necessary for men to go between the ends of the cars to couple and uncouple them, and where the cars, when coupled into a train, sometimes separated by reason of the insecurity of the coupling."

In *Johnson vs S. P. Co.*, 196 U. S. 1, 19, it is said:

"The risk in coupling and uncoupling was the evil sought to be remedied, and that risk was to be obviated by the use of couplers actually coupling automatically."

In *Lang vs. N. Y. C. R. Co.*, 255 U. S. 455, in the Syllabus, it is said:

"The purpose of the requirement of automatic couplers is to avoid risks in coupling and not to provide a place of safety between colliding cars."

*A fortiori*, it surely was not intended to provide a place

of safety between "quiescent cars," to borrow the apt expression used in *Chicago Junction vs. King, supra*.

In *C. M. & St. P. R. Co. vs. Voelker*, 129 Fed. 522, 526, it is said:

"The risks and dangers which attended the old link and pin system when couplings and uncouplings were effected by going between the cars were such a menace to the lives and limbs of those employed at that branch of railroad service, and these risks and dangers inhered so largely in the act of going between the cars, whether in the act of coupling or uncoupling, that there can be no doubt of the purpose of congressional enactment as well as that of the state to obviate and prevent this act of exposure, which the invention and use of automatic couplers had demonstrated to be wholly, or at least largely, unnecessary. \* \* \* The mischief to be prevented rested quite as much in the act of coupling as in the act of uncoupling."

In *U. S. vs. C. M. & St. P. R. Co.*, 149 Fed. 486, 488, it is said:

"The evil to be corrected was the injuries to, and death of, those required to couple and uncouple cars. Ten and more years ago every day we read of men killed in making and unmaking couplings."

In the Lang case, *supra*, at page 460, after reviewing the Conarty case this Court says:

"That case, therefore, declares the same principle of decision as the Court of Appeals declared in this, and, while there is some difference in the facts, the difference does not exclude the principle. In neither case was the movement of the colliding car directed to a movement of the defective car."

We think the foregoing clearly establishes the proposition that the statute is one of operation and that the only injuries contemplated by the act are those resulting from accidents occasioned by some movement of either coupling or uncoupling, or hauling or moving the car after the defect arises. There must be either use or attempted use of the car with the defective equipment actually present, and that use has solely to do with car movements.

In the *McCalmont* case, 283 Fed. 736, 739 (certiorari denied by this Court, 260 U. S. 751), the Circuit Court of Appeals said:

"Fully remembering the benefits of the Act are not confined to those who were actually trying to couple at the moment of the injury, still it does not follow that they extend to one who is merely putting the couplings in condition for use which, though it may come soon, is distinctly of the future and not of the present."

The Circuit Court of Appeals then summarizes at page 740, the classes of liability under the act. See our Summary of the Argument under 3.

#### SPECIFICATION NUMBER FOUR.

There was error in holding that the defective condition of the coupling equipment was the proximate cause of plaintiff's fall from the bridge; and in holding that there was causal relation between the separation of the couplers and plaintiff's fall, such fall occurring an appreciable time after the separation of the couplers and the cars had come to rest. The maladjustment of the coupling apparatus then became only a condition reflecting itself in the general physical setting where plaintiff was injured. At most it presented only

the occasion for plaintiff being where he was in making the repair upon the motionless car.

In the Conarty and Lang cases the accident resulting in injury was a collision, but this Court held that the *collision* not being proximately attributable to the defective appliances, recovery under the Safety Appliance Act could not be allowed. In the instant case, the *accident* resulting in injury was plaintiff's fall. This was not an accidental event in which any act of the defendant concurred. The links in the causal chain in inverse order from the injury were, (a) plaintiff's fall, caused by (b) loss of his balance, caused by (c) sudden coming around of the carrier iron, caused by (d) his pull and raising up on the drawbar. But the causal chain ends here. All else ~~is~~<sup>is</sup> condition. In *Davis vs. Wolfe*, 263 U. S. 239, 243, this Court, speaking through Mr. Justice Sanford, says:

"The rule clearly deducible from these four cases (Layton, Gottschall, Conarty and Lang) is that, on the one hand, an employe cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident otherwise caused, results in such injury."

In the Supreme Court of Minnesota, counsel for plaintiff in the instant case said:

"The failure of the coupling to hold separated the cars; such separation pushed the carrier iron around under the car parallel with the drawbar."

It seems to us that it was none the less an incidental condition or situation if it be conceded that it was caused by the separation of the cars. In the Lang case at page 461,

this Court says :

“The collision was not the proximate result of the defect. Or, in other words, and as expressed in effect in the Conarty case, that the collision under the evidence cannot be attributed to a violation of the provisions of the law, but only that had they been complied with, it (the collision) would not have resulted in the injury to the deceased.”

But in the instant case plaintiff cannot even go so far as to say that had the coupler provisions been complied with his fall would not have resulted in his injury. He would be in a position to invoke that fallacy were he claiming that the bridge caused his injury, and would say that had the bridge not been present the fall would not have injured him. He would be met by the answer that the bridge was a condition only. But the position of the carrier iron around under the car was a condition in exactly the same sense as the bridge. All plaintiff can say is that the separation produced that condition, precisely as it was contended in the Conarty and Lang cases that the absence of the drawbar and coupler produced a condition through which other forces operated to produce the injury.

Plaintiff's course of reasoning would appear to be that had there been no separation he would not have had occasion to go where he did; that had there been no separation the carrier iron would not have been in the position it was; had that condition not been brought about plaintiff would not have had occasion to pull upon the iron and raise the drawbar. But all these matters seem to us occasion and not causation. Under a statute inhibiting *use* a condition alone cannot be regarded as a causative force.

It seems clear that plaintiff was himself an independent

intervening cause which broke the causal chain (if indeed any existed) between the separation of the couplers and his fall. *G. N. R. Co. vs. Wiles*, 240 U. S. 445, and *Douglas vs. Wash. Ter. Co.*, 298 Fed. 199, seem directly in point. Surely it was plaintiff's duty to do his work in such a manner as to preserve his balance. Defendant did no act to upset his balance. In *C. R. I. & P. R. Co. vs. Brown*, 229 U. S. 317, 320, this Court approves an instruction of the lower court to the effect that an employe is required before he can recover, to exercise ordinary care for his own safety even while he is between cars endeavoring to effect an uncoupling. It may be contended that this language should be restricted to the exercise of ordinary care as against perils not arising out of coupling or uncoupling or hauling operations. So viewing it, it is in complete harmony with the Conarty and Lang cases. Let it be supposed that in the instant case plaintiff, when he reached a position between the cars, had stooped down and in that position approached the defective car and was injured by striking his head against the sagging drawbar. We would then have a situation like that in the Conarty and Lang cases and plaintiff would contend, as he does here, that had the drawbar been up in its proper position his head would not have come in contact with it. His position would be untenable; his contention would not be as reasonable as that in the Conarty and Lang cases for there the causal force which resulted in the collision was engendered by the Railway, while in the supposititious case it was engendered by plaintiff himself. But that is the precise situation here. The force of gravity which threw plaintiff from the bridge operated solely through his failure to preserve his balance. In this connection we may well refer to *Mfrs. Accd. Ind. Co. vs. Dorgan*, 58 Fed. 945, an opinion by Chief Justice Taft,

then Circuit Judge. There the conditions of an accident policy absolved the insurer from liability for injury or death happening directly or indirectly, in whole or in part, in consequence of disease, intoxicating liquor or bodily infirmity. Deceased, while fishing, fell from the bank into the stream and was drowned. His Honor, Judge Taft, says:

"We are of the opinion that in the legal sense and within the meaning of the last clause, if the deceased suffered death by drowning, no matter what was the cause of his falling into the water, whether disease or a slipping, the drowning in such case, would be the proximate and sole cause of the disability or death, unless it appeared that death would have been the result, even had there been no water at hand to fall into. The disease would be but the condition; the drowning would be the moving, sole and proximate cause."

Likewise, it would seem here that it is incumbent upon plaintiff to show that the failure of this coupler to work would have caused injury though there had been no bridge, no pulling, and no loss of balance on his part. It would seem that the sole, moving and proximate cause of plaintiff's injury was his own negligence in doing his work upon the bridge in the manner which he did it and that the coupler, as such, had no such causal relation to his fall and injury as the law requires.

In a recent scholarly study of causation by Joseph H. Beale of the Harvard Law School (*The Proximate Consequences Of An Act*, 33 Harvard Law Review, 633), there will be found at page 641, language exactly fitting the situation here:

"Defendant's force had come to rest in a position of apparent safety; some new force then combined with

this condition to create harm; the result was consequently remote from defendant's act."

Again Professor Beale says:

"Take a given situation: forces quiescent, forming a general condition of affairs, what might perhaps be called a set stage. Into this condition a new force is interjected, causing a rearrangement of affairs, a change of condition, a new event, which we call a result. This is the first step in causation. If, then, a second active force comes upon the scene, causing a new result, this second result is the indirect, but not the direct, result of the first active force considered."

Here the first given condition or set stage might be considered to be the train in a coupled condition on its journey. Into this condition a new force is interjected, to-wit, the parting of the train causing a rearrangement of affairs, *i. e.*, the parted and motionless cars. This was the first step in causation and it was caused by the failure of the coupling apparatus. But that did not injure plaintiff. He then became the second active force and what he did, and that only, caused the new result, *i. e.*, his fall. But the fall must be considered the indirect, and not the direct, result of the parting of the train.

*Lanz vs. Penna. R. Co.*, 281 Fed. 796, 798.

The Minnesota Supreme Court in its first opinion, 154 Minn. 6, concedes that if plaintiff had slipped and fallen while walking alongside the train in going from, or returning to, the caboose, defendant would not be liable. But why not take the next logical step and say that whether going to, or coming from, or *present at* the scene of the trouble if injured by an accident, *otherwise caused* than

by the failure of the coupling, no recovery can be had.

The Minnesota Supreme Court granted a reversal in its first opinion because of the refusal of the trial court to give the following requested instruction:

“If you find from the evidence that the plaintiff fell from the bridge when the train was coupled together and not in motion, then your verdict must be for the defendant.”

It is then explicitly held that if the plaintiff fell from the bridge when the train was coupled together and not in motion, the defective condition of the coupling apparatus was not the proximate cause of the injury. But why is it not just as logical to say that if plaintiff fell from the bridge when the train was uncoupled apart and not in motion, the defective condition of the coupling apparatus was not the proximate cause of the injury? The Court seems to assume that if the train was coupled together the act of coupling would be over. It may be said with equal force that while it was standing separated and not in motion the act of uncoupling was over. *Davis vs. Hand*, 290 Fed. 73, 77 (certiorari denied 263 U. S. 705). It is admitted on all hands that neither coupling nor uncoupling, nor any movement whatever, was possible at the time that plaintiff fell because the brakes were locked upon each section of the train.

#### SPECIFICATIONS NOS. FIVE AND EIGHT.

There was error in holding that plaintiff “was actually engaged in a coupling operation” at the time of his fall, 159 Minn. 44. Plaintiff never claimed that he was engaged in a coupling operation at the time he fell. He alleges in his complaint (R. 1 and 2), that it was necessary for him

to, and he did, go between the cars "*to repair, and readjust, and replace said drawbar in position, so that said two cars could couple on impact; that in order to do said work, it was necessary for the plaintiff to stand upon said bridge; that while he was endeavoring to readjust and repair said coupler so as to enable said coupling to be made, said carrier iron, which he was attempting to draw back into place, suddenly gave way and the plaintiff was then and thereby thrown from his position and caused to fall from said bridge.*"

In his opening statement to the jury, counsel for plaintiff said (R. 10) :

"In this action the negligence that we claim on the part of the Railroad is that at the time and place in question they had a coupler upon that car that was defective and out of order and *which could not be used and which prevented the train from being coupled together* without the necessity of plaintiff going up there on the bridge in the dark, in the night and storm, and *fixing* this defective coupler and getting it back, in order to perform his primary duty of coupling the train together again, and that was the cause of this accident, because the defendant did not *have* a coupler as the law required."

Plaintiff testified that the coupler was in such condition that the train could not be coupled up unless he fixed the drawbar, that it was his duty at that time as brakeman to *repair* it and get the train going (R. 20). At R. 24 he says that after the train separated the second time, he proceeded "*to fix it up again*"; and at R. 25 he says that while he was doing this work of *fixing the coupler* he was between the cars and that he was *fixing it for the purpose*

*of making another coupling.* Upon the first trial, the trial court instructed the jury that if they found that in the performance of his duties plaintiff necessarily went between the cars and there engaged in the work of *repairing the coupler*, and while *so engaged*, slipped or fell from the bridge, the verdict must be in his favor. The Supreme Court in its first opinion, 154 Minn. 7, approves this instruction. Moreover, the express holding in the Syllabus is "that the protection of the Federal Safety Appliance Act extends to a brakeman while engaged in *repairing* a defective coupler which has caused an interstate train to break in two, the *repair* being made on the road in order that the train *may be* coupled together again and proceed on its way. A recovery by a brakeman *so engaged*, who was injured by falling from a bridge upon which the break in the train occurred, cannot be defeated on the ground that there was no causal relation between the failure to comply with the statute and the ensuing injury."

No one appears to have questioned at any time that plaintiff was engaged in making repairs, until the latter part of the second opinion. In the first part of the second opinion the work is spoken of in two places as "emergency repairs." It would not seem that the word "emergency" is of saving potency. Those are precisely the kind of repairs contemplated by the amendment. The second opinion at page 44, states:

"Plaintiff had to *prepare* the coupler *so it would couple* with the other car."

By this process the Court finally arrives at what seems the unwarranted conclusion that "he (plaintiff) was actually engaged in a coupling operation," a theory which does not seem to have previously occurred to anyone connected

with the case.

The statement that plaintiff was engaged in a coupling operation at the time of his fall is not only unsupported by anything in the Record, but the Record shows the direct contrary to be the fact. Plaintiff swears that seven distinct steps were necessary before any coupling operation could even begin. These steps will be found listed in our statement of facts, page 12 of the brief, and have already been adverted to, also the fact that plaintiff was engaged in the first step when he fell.

Evidently the Court found it necessary to make the assumption in its second opinion that plaintiff was engaged in a coupling operation from the fact that it had held in the first opinion that making repairs was a violation of the Safety Appliance Act, or that mere possession of the car in a defective condition was such violation, or that having a car likely to become defective in use was a violation. The wholly untenable nature of each of those positions, becoming apparent the Court is finally compelled, without basis in the Record, to hold that plaintiff was engaged in a coupling operation when even the plaintiff had never before conceived of such a thing. The trial court instructed the jury that the extent of plaintiff's claim was that he was repairing, readjusting and replacing the drawbar in position so that the cars could couple on impact and so that the two drawbars if coupled would remain coupled.

In granting a reversal in its first opinion, the Minnesota Supreme Court held that defendant was entitled to the following requested instruction:

"If you find from the evidence that the injuries of which plaintiff complains were occasioned in any other manner than by the slipping of the carrier iron when

he was pulling upon the same, your verdict must be for the defendant."

The substance of this request is that it was necessary that plaintiff be injured *by the slipping of the carrier iron when he was pulling upon the same*. By the second opinion this act of pulling upon the carrier iron, which was the very initial step in the repair, is made synonymous with "coupling operation."

It seems to us, as it did to the Supreme Court of Iowa in *Woodbury Co. vs. Williams Tackaberry Co.*, 166 Iowa 642, that the word "repair" is plain and its meaning unambiguous and that it should be accorded its ordinary meaning. The Iowa Court then states that "repair is restoration by renewal or replacement of subsidiary parts of a whole." Plaintiff testifies in this case that his first work was to renew the nut on the bolt holding up the carrier iron; in lieu of that renewal he inserted shims under the drawbar to raise it to the proper height. In preparation for that renewal, which had for its object the restoration of the drawbar to its proper height, he was pulling the carrier iron around into its proper position at right angles with the drawbar. Restoration to proper condition was the object sought. To quote from the Supreme Court of Wisconsin in *Koepp vs. Nat'l E. & S. Co.*, 151 Wis. 302, "the language of the statute as to the employer's duty to furnish safe appliances for the work of 'repairing' includes any work of *restoration to a former more perfect condition*." Quoting also from the Supreme Court of Michigan in *Walker vs. Detroit*, 143 Mich. 427, " 'To repair,' as is ordinarily understood, is to mend, not to make a new thing, but to refit or make good or restore an existing thing."

Again, it seems to be conceded that if plaintiff had been

a repairman and doing exactly the same thing that he was doing, he would not be engaged in a coupling operation. When it is conceded that a repairman might be called upon to do the repair, and plaintiff thereafter called upon to do the coupling, it becomes plain that the operations are separate and distinct. It is not likely that the repairman would undertake to do the coupling at all, that would be left to the plaintiff as brakeman. The fallacy inheres in assuming that because the plaintiff was a brakeman he was engaged in a coupling operation while had he been a repairman exactly the same thing would not have been a coupling operation.

The importance of having the error as to what is a coupling operation corrected becomes more important when we find that the Federal Courts have held the direct contrary of the holding of the Minnesota Supreme Court. In the *McCalmont Case*, 283 Fed. 736, 742, the word "coupling" is defined as "the operation which accompanies the approach of one car to the other. A crushing impact is the expected incident of the normal coupling and for this safeguards are necessary; not so necessarily of a 'coupling' which calls for no impact." The holding of the Supreme Court of Missouri is likewise squarely to the contrary of the Minnesota Supreme Court. In *Rittenhouse vs. St. L. & S. F.*, 252 S. W. (Mo.), 945, 948, that Court said:

"He (plaintiff) did not go between the cars for the purpose of making the coupling. The first two cars had become stationary, so that, if he had desired, he could not have coupled the cars by impact. His sole purpose was to repair the coupler. It is true that the repair contemplated its future use; but the repair *would not be extended* to the act of coupling the cars."

What plaintiff was doing falls squarely within the definition of "repairing" as used in the recent case of *B. & O. R. Co. vs. Tittle*, C. C. A., 6th Cir., decided April 10, 1925, 4 Fed. Rep. (2d Series), 818; certiorari denied by this Court October 12, 1925. In that case a switchman, after two unsuccessful attempts to couple two cars by impact, went to the place where the cars were to make the coupling, attempted to open the knuckle with the lifting lever, made an unsuccessful attempt to open the knuckle with the lifting lever, then proceeded to the coupler for the purpose of adjusting the knuckle so that the coupling would make. Thinking that the coupler was jammed he pulled out the knuckle pin to loosen it. Wholly unknown to him the lip of the knuckle was broken. Solely for that reason the knuckle fell upon his foot. The break was not visible and the plaintiff knew nothing about it. The opinion does not state whether at the moment of trying to make the adjustment by pulling out the knuckle pin the other cars and engine were moving toward the defective car; the inference is that they were. The claim was made that the plaintiff was repairing a defective coupler. This was met by the answer that he did not know it was defective, therefore could have had no intention to repair. The Court states:

"The plaintiff was not engaged in repairing the coupler, in the sense of remedying defective mechanism, or making alterations or changes in its part, but, according to his evidence, was attempting to loosen it, so that he could perform his duty of coupling the cars. His status therefore was not that of one repairing cars, but of a switchman preparing to make a coupling."

In the instant case it must be conceded that plaintiff Goneau was remedying defective mechanism; that is exactly

what he testifies he was doing. In the Tittle case it is then held that had plaintiff known of the defective condition and been engaged in remedying it he could not have recovered. This was the situation in the case at bar; as will be more fully discussed in the specification of sole negligence.

We have already called attention to the language in the McCalmont case holding that "the benefits of the act do not extend to one who is merely putting the coupler in condition for use, which, *though it may come soon* is distinctly of the future and not of the present." In its second opinion the Minnesota Supreme Court seems to find justification for its statement in the case of *Eric R. Co. vs. Russell*, 183 Fed. 722, and says:

"In our opinion the facts of this case are more nearly within those in *Eric Ry. Co. vs. Russell*, 183 Fed. 722, than any other to which attention has been drawn. Certiorari therein was denied, 220 U. S. 607. This must be taken as an affirmance of the law as stated and applied by the Circuit Court of Appeals."

This Court has announced the contrary of this statement as the law. In *Hamilton vs. Wolf*, 240 U. S. 251, this Court, speaking through Mr. Justice Pitney, says:

"It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the decree that is sought to be reviewed."

Indeed this must be so; otherwise it might be contended with equal force that the mere granting of the writ is a reversal of the decree sought to be reviewed. The Russell case is an old one. The accident out of which it grew occurred long prior to the passage of the present Federal Em-

ployer's Liability Law, viz., June 21st, 1907. The report of it—220 U. S. 607—is simply this:

"Dismissed for want of jurisdiction. Writ of certiorari denied."

The Russell case arose long prior to the Conarty, Lang, Layton, Gottschall, Wolfe, and kindred cases, and long prior to any of the cases cited in the Wolfe case. We think it would not now be held to be the law. That cause of action arose, too, long prior to the Amendment of April 14, 1910, permitting the making of emergency repairs on the spot if it be possible to do so.

But in the Russell case, as we have seen, there was an act of coupling, though unintended. The Circuit Court of Appeals really impeaches its own reasoning by saying:

"Indeed, were the questions to be decided free of authority, a majority of the court would have difficulty in holding the repair of the coupler was a part of the coupling operation, and bore such a relation to the impact of the cars that the necessity for such repairs was an efficient cause of the accident."

The Court then goes on to say:

"Moreover it appears that it was intended to couple the cars with the defective coupler to the standing cars as soon as the coupler should be repaired."

By this language the Court impliedly admits the independence of repair from coupling. In any view the Russell case is no authority for the holding in this case. The Court speaks specifically of the injury being caused by the *impact* of the cars.

It would seem that it was entirely unnecessary to suggest that the repair of the coupler was a part of the coupling

operation; it was necessary only to hold that an operation of coupling onto a defective car was in progress and caused the injury. The *Voelker Case*, 129 Fed. 522, is no authority for holding that an act of repair is an act of coupling, for Voelker was between the ends of cars opening a knuckle when other cars were negligently kicked down against it, thus falling squarely within the definition in the *McCalmont* case.

Evidently, in view of the quoted language in the *Russell* case, the Minnesota Supreme Court attaches importance to the fact that it was plaintiff's intention to later couple onto the defective car. But in the *Russell* case this appears to have been emphasized only for the purpose of showing that the intended coupling was premature, not intended at the time. Nevertheless, a coupling operation was going on and that was what injured Russell. But here, the coupling operation was distinctly of the future and not of the present. We do not think it a sound principle of law that inaction plus intention equals action. We think it fundamental that there must be some "overt act" directly in line with the intended accomplishment.

But indulging the far-fetched assumption that what plaintiff was doing might be called a coupling operation, does not save the case. What he was doing he was doing, by whatever name it be called. He alleges and testifies that he was repairing, readjusting and replacing in position the defective drawbar. That was the full extent of the proof. The Minnesota Supreme Court in its second opinion, 159 Minn. 44, says:

"Here the defective coupler caused plaintiff to go between the cars and attempt to put it in condition to couple, and in that attempt he was injured."

It may be assumed that the expression "put it in condi-

tion to couple," is used as a substitute for plaintiff's allegation that he was "repairing, readjusting and replacing in position" the defective drawbar. But the statute does not provide for recovery for injuries caused *by* repairing, readjusting or replacing in position defective coupling equipment; it provides recovery for injuries caused solely by the use or hauling of the car with defective coupling equipment thereon. Calling plaintiff's acts a coupling operation avails nothing, the fact remains that the statute does not prohibit repairing, readjusting or replacing in position of defective coupling equipment; it prohibits only the hauling or use of the car with the defective equipment thereon. The Minnesota Supreme Court does not find, nor can it be found, that plaintiff was injured by the use or hauling of the car; it finds, as must be found, that plaintiff was injured by his own acts while repairing the coupling equipment. Suppose plaintiff, instead of falling from the bridge, had pounded his thumb. Could liability then be fixed upon the Railway by saying that he was engaged in a coupling operation when he did it? If his injury was not within the statute, it matters not what his acts are called.

To demonstrate the unsoundness of the "coupling operation" holding, we discuss at this point Specification Number 8. In its first opinion the Minnesota Supreme Court states that if plaintiff stepped to the side of the bridge to give a signal, the alleged delinquency was not the proximate cause. By reason of the strength of defendant's showing that such was the fact, counsel for plaintiff stated to the jury (R. 364) that "if he (plaintiff) had made the coupling and had stepped outside for the purpose of slacking back and testing it, it is all a part of an attempt to make the coupling." This was in connection with a statement made just preceding with

reference to the instruction which the Supreme Court held proper and counsel said:

"Now that instruction will be given you by the Court. Well that instruction means this,—nothing else,—that instruction means, if you find that Goneau had succeeded in making a coupling of that train, finished making it ready to go, not for the purpose of testing it if he stepped off, not at all to see whether it would work because that was part of the act of fixing the coupling up, testing it out, like the slack ahead signal is testing it out, as counsel told you, all finished ready to go."

Prompt exception was taken to this language and the trial court was asked to admonish the jury to disregard it. The request was not granted. In its second opinion, 159 Minn. 47, the Court finds itself forced to approve this language, thereby reversing the very ground on which the reversal had been granted in the first opinion. It could not hold the first step in the repair a coupling operation without conceding that signalling the back-up was also a coupling operation. But this Court, we conceive, is in no manner bound by this "coupling operation" holding by the Minnesota Court. What is, or is not, a coupling operation within the meaning of the Federal Act is purely a question of law which this Court will determine for itself.

#### SPECIFICATION NUMBER SIX.

Plaintiff, not being injured *by* the use or hauling of the car, but being injured by his own acts while repairing, it was error to deprive defendant of its common law defenses, and it was error to refuse the instruction that if the jury found that if plaintiff's fall arose solely upon his being upon the bridge and doing his work thereon, the verdict must be for

the defendant. As stated by his counsel, in the opening statement (R. 10, f. 20), "plaintiff had been over this bridge a good many times." On this particular occasion, when the train separated and stopped on the bridge, plaintiff walked from the caboose westerly to the point of the separation, and then walked over the remainder of the bridge to the westerly end where he got the shims and returned to the point of separation. The character and condition of the bridge was therefore fresh in his mind. The complaint makes no allegation of negligence with respect to the condition of the bridge. The probability of the carrier iron swinging around easily was likewise fresh in the mind of the plaintiff, for he had just gone through the entire performance of repairing the carrier iron and getting the cars together. He knew what miscalculation in such a place would mean. The car was about 40 feet long. The westerly or front end of it must therefore have been upon the ground at the west end of the bridge. There was no obstacle to plaintiff's signalling the train ahead a car length and performing his work upon the solid ground in safety. Under these circumstances he clearly assumed the risk. The fact that he acted in the presence of a defective safety appliance does not obviate, nor affect, the assumption of the risk.

*S. P. Co. vs. Berkshire*, 254 U. S. 415.

*McDougall vs. A. T. & S. F. R. Co.*, 186 Pac. (Kan.), 1028 (writ of certiorari denied by this court, 254 U. S. 629).

*Powers vs. Hocking Valley*, 31 Ohio Cir. Ct. Rep. 488.

*Gt. Nor. R. Co. vs. Wiles*, 240 U. S. 444.

*Judd, Adm'r. vs. So. Ry.*, 188 S. W. (Ky.) 880.

*Devine vs. C. & C. R.*, 102 N. E. (Ill.) 807.

*Fletcher vs. S. D. Cent.*, 155 N. W. (S. D.) 3.

*Brown vs. D. S. S. & A. R. Co.*, 147 Minn. 167.

*Sorrell vs. M. K. & T.*, 230 S. W. (Tex.) 768.

*Norgate vs. D. & R. G. R. Co.*, 141 Fed. 247.

*Boldt vs. Penna. R. R. Co.*, 245 U. S. 441

*Flack vs. A. T. & S. F. R. Co.*, 285 Mo. 28; certiorari denied, 256 U. S. 690.

#### SPECIFICATION NUMBER SEVEN.

The injury was due solely to plaintiff's own acts and whether those acts were negligent or not is immaterial. They would seem to be negligent from the fact that plaintiff chose to do his work in the hazardous position upon the bridge when he might readily have obviated it by signalling the car ahead. It may be argued that such movement, with the defective appliance present, would have been a violation of the statute and that plaintiff was not bound to violate the statute. It was not a violation of the statute to move the car if in the exercise of ordinary care plaintiff should have done so. It may be argued that had he been injured by such movement he could recover. The sufficient answer is that he was not so injured and that it conclusively appears that he could not have been thereby injured because the signalling would have been done from the top of the first car of the rear section.

The case of *B. & O. R. Co. vs. Tittle*, 4 Fed. (2d) 818; in which this Court denied a writ of certiorari October 12th, 1925; will undoubtedly be cited as authority for plaintiff's contentions here. Rather, does the holding in the *Tittle* case call for a reversal here. It is there expressly held that had *Tittle* known of the defective condition and had been engaged in remedying it, no recovery could be had. Such was the charge of the trial court. The jury, upon the evi-

dence, found he had no such knowledge. Manifestly, he could not be engaged in repairing a condition of which he knew not the existence. Here, it is the very foundation of plaintiff's claim that he had full and accurate knowledge of the defect. That is the reason he was repairing it. The claim is that the violation of the statute consisted in permitting a condition to arise calling for repairs. No such contention was made in the Tittle case. Tittle was coupling, not repairing. The controlling circumstance of knowledge of the defective condition was absent there. It is present here. Plaintiff had the whole situation presently in mind. He had just passed through the entire operation. His own acts, whether negligent or not, were the sole proximate cause of his injury. *Salsedo vs. Palmer*, 278 Fed. 92, 96.

### CONCLUSION.

The Federal Safety Appliance Act has in this Goneau case been transformed and made to read:

"It is unlawful for any common carrier to haul, or permit to be hauled, or used on its line any car on which the automatic coupling equipment is likely to become defective in use and which may necessitate the going between cars by employes to repair, readjust or replace in position such coupling equipment after it becomes defective, and the protection of this Act shall be extended to all employes so engaged from whatever cause injury may arise."

If the Safety Appliance Act is to be so extended it seems to us it will be beyond anything intended by Congress. It seems to us further that the great principles laid down by this Court in the cases of *Lang*, *McWhirter*, *Conarty*, *Berk-*

shire, Wiles, Boldt and kindred cases; as well as the lower Federal Courts in such cases as McCalmont, Hand and Phillips, and by the State Courts apart from Minnesota, have been widely departed from by the Minnesota Supreme Court in this case.

It is therefore most respectfully submitted that the judgment should be reversed.

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Minneapolis, Minnesota,*  
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*Bemidji, Minnesota,*  
*Counsel for Petitioner-Defendant.*

Service of the foregoing brief is hereby acknowledged this second day of November, 1925.

SAMUEL A. ANDERSON,  
*Attorney for Ernest J. Gonceau,*  
*Plaintiff-Respondent.*

**FILED**

**MAY 29 1924**

**WM. H. STANSBURY**  
**CLERK**

IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 19[REDACTED] 1925

No. **10** [REDACTED] **41378**

MINNEAPOLIS, ST. PAUL & SAULT STE MARIE RAIL-  
WAY COMPANY,

*Petitioner,*

versus

ERNEST J. GONEAU,

*Respondent.*

**BRIEF FOR RESPONDENT IN OPPOSITION  
TO PETITION FOR WRIT OF  
CERTIORARI.**

**SAMUEL A. ANDERSON,**  
509-511 Exchange Bank Building,  
St. Paul, Minnesota,  
Attorney for Respondent.

IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1923.

No. ———  
—————

MINNEAPOLIS, ST. PAUL & SAULT STE MARIE RAIL-  
WAY COMPANY,

*Petitioner,*

VERSUS

ERNEST J. GONEAU,

*Respondent.*

—————  
**BRIEF FOR RESPONDENT IN OPPOSITION  
TO PETITION FOR WRIT OF  
CERTIORARI.**  
———

**STATEMENT OF FACTS.**

Admittedly the petitioner was an interstate carrier by railroad, and the respondent, rear brakeman, on petitioner's interstate freight train, was injured while employed in interstate commerce. He and his crew took charge of the train at Ladysmith, Wisconsin, for the purpose of running it to Superior, Wisconsin. Just after pass-

43859

ing out of Gordon, seventy miles west of Ladysmith, the train separated between the fortieth and the forty-first car from the engine, there being seventy cars in the train, and stopped in emergency because of such separation and the consequent uncoupling of the air hose. This occurred at night and in a rain storm, the point of separation being on an open narrow bridge over the St. Croix River. There is no dispute as to these facts, nor as to the cause of the train breaking in two. This was caused by virtue of the fact that the sole support of the outer end of the coupler, known as the carrier iron, became loose at one end whereby the coupler dropped so far that the 9-inch knuckle slipped down and out of the associated knuckle on the other car. It is also undisputed that, when in proper condition, the carrier iron as described by the testimony for the petitioner, was held in position by 8 bolts, 4 vertical bolts and 4 horizontal bolts. The petitioner admits that, when it put this car in the train at a certain point in Wisconsin, all of the horizontal bolts and two of the vertical bolts were gone, leaving only one vertical bolt in each end of the carrier iron to support the terrific strain necessarily put upon it in transit. Consequently one nut on one bolt came off just as the train passed out of Gordon with the results stated.

It then became the duty of the respondent as a brakeman in the crew to recouple the train at once, if possible, so as to continue the journey. He went to the place of separation in the dark and

rain and on the bridge and in the performance of the duty of recoupling necessarily went between the two cars and engaged in the work of getting the defective coupler in proper alignment so as to make the immediate coupling contemplated, every bit of work he was doing being a part of the act of attempting to recouple the train. He was not engaged in any repair work, either as that term is used by counsel for petitioner in their brief or otherwise, when injured. He was then attempting to make the coupling. Because of its broken down and defective condition it was necessary for the respondent to go on the bridge, between the cars, and to work the loose carrier iron back into its position in connection with and as a part of the work of raising the coupler into alignment so that the two knuckles would meet and catch. He succeeded in doing this in a manner, getting the coupler into such a position that it would partially couple. Immediately he then started his train, after backing up and making the coupling. But the coupling separated again and caused the brakes to set in emergency. Hence he was under the necessity of repeating his work in attempting to couple. It was while he was raising the coupler and pulling the carrier iron back that the carrier iron suddenly and unexpectedly gave way whereby he was precipitated from the bridge to his injury. The above statement completely and fully presents a picture of the actual proceedings as they took place.

## POINTS AND AUTHORITIES.

THE DUTY TO HAVE COUPLERS IN PROPER CONDITION AS PROVIDED FOR BY STATUTE IS UNQUESTIONABLY ABSOLUTE, IMPERATIVE AND CONTINUOUS.

*St. L. R. Co. v. Taylor*, 210 U. S. 281.

*Chicago, etc., Ry. Co. v. U. S.*, 220 U. S. 559.

*Delk v. R. R. Co.*, 220 U. S. 580.

*Chicago, etc., Ry. Co. v. Brown*, 229 U. S. 317.

THE DEFECTIVE CAR WAS IN USE WITHIN THE MEANING OF THE FEDERAL SAFETY APPLIANCE ACT.

*Johnson v. Southern Ry. Co.*, 196 U. S. 1.

*Eric R. Co. v. Russell*, 183 Fed. 722.

*Same case*, 220 U. S. 607.

These authorities, and particularly the Russell case as affirmed by this Court, conclusively establishes that the car in question was in use. It was not necessary for the car to be in motion in order to be in use within the meaning of the statute. Admittedly, the car had not been taken out of the train and out of use for repair purposes. It was still in the train. The respondent, member of the crew, was attempting to couple to it again so as to proceed on the journey.

The car with the defective coupler in the Russell case was standing on a track in the yards, when the plaintiff's deceased was killed. He was holding a knuckle in the defective coupler while another member of the crew was looking for a knuckle pin

to fasten the knuckle in position. They were doing this work so as to make a coupling and then move the car. The Circuit Court of Appeals and this Court held that that car was in use within the meaning of the statute. Necessarily the same holding must be made in the case at bar.

THE DEFECTIVE COUPLER WAS A PROXIMATE CAUSE OF THE ACCIDENT.

Erie R. Co. v. Russell, 183 Fed. 722.

Same case, 220 U. S. 607.

Chicago, etc., R. Co. v. King, 222 U. S. 222.

Chicago, etc., Ry. Co. v. Brown, 229 U. S. 317.

M. & St. L. R. Co. v. Gotschall, 244 U. S. 66.

Davis v. Wolfe, 44 Sup. Ct. R. 64.

See also,

Fletcher v. Ry. Co., 36 S. Dak. 401.

Sprague v. Ry. Co., 104 Minn. 58.

Pound v. R. R. Co., 114 Minn. 312.

Ahrens v. Ry. Co., 120 Minn. 335.

Burbo v. R. R. Co., 121 Minn. 326.

We again refer to the Russell case as a conclusive authority in support of the above proposition. It is also a conclusive authority against the contention of counsel for petitioner that in order for an injured railroad employee to be entitled to the benefit of the Employers' Liability Act and the safety appliance acts there must be a movement or immediate operation of an engine, train or car in

connection with the accident. No such condition existed in the Russell case. It generally is a fact that an accident in connection with a defective coupler is accompanied with an engine, car or train movement. But this is merely an incident. It is never held as the basis of liability. It is never held as the reason for saying that the defective coupler was the, or a proximate, contributing cause. This appears clearly not to have been the basis of the Russell decision. There was no train, engine or car movement or operation in connection with that accident. Certain cars drifted down and killed the plaintiff's deceased. But they were not set in motion voluntarily by any act of anybody. But it is plainly evident that the fact that the cars moved down and killed plaintiff's deceased was not the basis of the holding of the Circuit Court of Appeals nor of this Court that the defective coupler was the, or a proximate, cause of the accident. That case, and all the cases cited under this heading, directly and conclusively are in support of the holding of the Supreme Court in the case at bar where that Court says (154 Minn. 1, 5) :

"The conditions were such that a coupling could not be made automatically by impact. If plaintiff was attempting to bring the draw-bar back to its proper position so the coupling could be made, we think the protection of the act extended to him while he was so engaged."

"Assuming that the accident happened in the manner described by plaintiff, can it be said that the violation of the act was the proxi-

mate cause of his injuries? We think the question requires an affirmative answer. It matters little whether he was attempting to make the coupling or right the position of the draw-bar so the coupling could be made automatically by impact. In either case the chain of events extended uninterruptedly from the defective appliance to the injury, and there was the direct casual relation which the law requires."

The authorities cited under the immediately following heading also are in point that the defective coupler was the, or a proximate, direct cause of the accident, and that the respondent was entitled to the benefit of the statute.

THE APPLICATION OF THE STATUTE IS NOT CONFINED TO EMPLOYEES INJURED WHILE ATTEMPTING TO COUPLE OR UNCOUPLE.

Louisville, etc., Ry. Co. v. Layton, 243 U. S. 617.

Chicago, etc., R. Co. v. King, 169 Fed. 372.

Same case, 222 U. S. 222.

✓ M. & St. L. R. Co. v. Gotschall, 244 U. S. 66.

Clapper v. Dickinson, 137 Minn. 415.

Davis v. Wolfe, 44 Sup. Ct. R. 64.

The principle established in these cases and directly having to do with proximate cause is clearly set forth by this Court in the Layton case as follows:

"While it is undoubtedly true that the immediate cause for passing the laws requiring automatic couplers was the great number of deaths and injuries caused to employees who were obliged to go between cars to couple and uncouple them, yet these laws as written are by no means confined in their terms to the protection of employees only when so engaged. The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful to use cars not equipped as required—not from the position the employee may be in or the work which he may be doing at the moment when he is injured. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey the Safety Appliance Law is the proximate cause of injury to them when engaged in the discharge of duty."

Counsel for petitioner entertain an entirely erroneous view as to what this Court said and established in the Conarty and Lang cases cited in their brief. These cases have no application. The employee injured was not nor was any one coupling or attempting to couple to the defective coupler or defective car. There was simply a collision with such car under such circumstances that, had the coupler been in proper condition the collision might not or would not have injured the

plaintiffs. In the Wolfe case, *supra*, this Court, speaking of these two cases, says:

✓ "In those cases it was held that, the collisions not being proximately attributable to the absence of automatic couplers on the standing cars, the carriers were not liable for the injuries received by the employees, even if the collisions would not have resulted in injuries to them had the couplers been on the standing cars, the requirement of automatic couplers not being intended to provide a place of safety between cars brought into collision through other causes."

This Court in the same case, speaking of the Layton and Gotschall cases, and also the Conarty and Lang cases, says further:

"The rule clearly deducible from these four cases is, that on the one hand an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injuries, but merely created an incidental condition, or situation, in which the accident, otherwise caused, results in such injuries; and, on the other hand, he can recover if the failure to comply with the requirements of the act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection."

THE SUPPLEMENTAL SAFETY APPLIANCE ACT OF APRIL 14, 1910, CHAPTER 160, SECTION 4, HAS NO APPLICATION.

That section of that Act simply permits an interstate carrier under the conditions set forth in the section to haul a defective car from the point where the same became defective without incurring the statutory penalty. It has nothing to do with and it in no way modifies the liability as between the carrier and its employees for injuries growing out of violation of the Safety Appliance Act. In any event the respondent cannot be said to have been engaged in the repair work at the time of his accident contemplated by the statute in question. In fact, section 4 has no application to the facts in the case at bar in any event. This car was put in the train and started on its journey with a defective coupler. Its defective condition simply resulted at the place of the accident in the coupler separating. The respondent was not attempting to make any repairs in any sense contemplated by said section 4.

We respectfully submit that the prayer of petitioner for a writ of certiorari should be denied.

SAMUEL A. ANDERSON,  
509-511 Exchange Bank Building,  
St. Paul, Minnesota,  
Attorney for Respondent.

POSTED TO MERITS  
MAY 25 1925

FILED  
FEB 16 1925

WM. R. STANSBURY  
CLERK

**SUPREME COURT OF THE UNITED STATES**

October Term, 1924 1925

No. 1157 76

26

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAIL-  
WAY COMPANY,

*Petitioner,*

vs.

ERNEST J. GONEAU,

*Respondent.*

—  
MOTION OF RESPONDENT TO DISMISS OR  
TO TRANSFER FOR HEARING TO THE  
SUMMARY DOCKET AND BRIEF  
IN SUPPORT THEREOF.  
—

SAMUEL A. ANDERSON,

Attorney for Respondent,

509-519 Exch. Bk. Bldg.,

St. Paul, Minnesota.

## SUBJECT INDEX.

|                              | Page. |
|------------------------------|-------|
| Motion . . . . .             | 1     |
| Notice of Motion . . . . .   | 2     |
| Statement of Case . . . . .  | 3     |
| Statement of Facts . . . . . | 4     |
| Argument . . . . .           | 8     |

## CASES CITED.

|   |        |
|---|--------|
| Aetna Life Ins. Co. v. Dunken, 45 S. C. R. 209                  | 12     |
| Ahrens v. Ry. Co. 120 Minn. 335. . . . .                        | 22     |
| Burke v. R. R. Co., 121 Minn. 326. . . . .                      | 22     |
| Baltimore, etc. R. Co. v. Groeger, 45 S. C. R.<br>169 . . . . . | 21     |
| Calhoun v. Ry. Co., 162 Wis. 264. . . . .                       | 22     |
| Chi. etc. R. Co. v. Brown, 229 U. S. 317. . . . .               | 22     |
| Chi. etc. R. Co. v. King, 222 U. S. 222. . . . .                | 22     |
| Chi. etc. R. Co. v. King, 169 Fed. 372. . . . .                 | 21     |
| Chi. etc. R. Co. v. U. S. 220 U. S. 559. . . . .                | 21     |
| Davis v. Wolfe, 44 S. C. R. 64. . . . .                         | 22     |
| Delk v. R. R. Co. 220 U. S. 580. . . . .                        | 21     |
| Erie R. Co. v. Russell, 183 Fed. 722. . . . .                   | 18, 21 |
| Same case, 220 U. S. 607. . . . .                               | 18, 21 |
| Erie Ry. Co. v. Caldwell, 264 Fed. 947. . . . .                 | 22     |
| Fletcher v. S. D. R. Co., 36 So. Dak. 401. . . . .              | 22     |
| Forsyth v. Hammond, 166 U. S. 504. . . . .                      | 19     |
| Furness, etc. Co. v. Young-Tsze, 242 U. S. 430                  | 19     |
| Grand Trunk v. Lindsay, 233 U. S. 42. . . . .                   | 22     |
| G. N. R. Co. v. Knapp, 240 U. S. 264. . . . .                   | 22     |
| G. N. R. Co. v. Otos, 239 U. S. 349. . . . .                    | 18, 21 |

|   |        |
|---|--------|
| Houston Oil Co. v. Goodrich, 245 U. S. 440..    | 19     |
| Johnson v. G. N. R. Co., 178 Fed. 643.....      | 18, 21 |
| Johnson v. Southern R. Co., 196 U. S. 1.....    | 18, 21 |
| Louisville etc. R. Co. v. Layton, 243 U. S. 617 | 22     |
| M. & St. L. R. Co. v. Gotschall, 244 U. S. 66.. | 22     |
| Pound v. Ry. Co., 114 Minn. 312.....            | 22     |
| Southern Power Co. v. N. C. etc. Co., 44 S. C.  |        |
| R. 164 .....                                    | 19     |
| St. Louis R. Co. v. Taylor, 210 U. S. 281.....  | 21     |
| Sprague v. R. Co., 104 Minn. 58.....            | 22     |
| Spokane, etc. Co. v. Campbell, 217 Fed. 518..   | 22     |
| Same case, 241 U. S. 495.....                   | 22     |
| U. S. v. St. Louis R. Co., 184 Fed. 128.....    | 18, 21 |

# SUPREME COURT OF THE UNITED STATES

October Term, 1924.

No. 413.

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MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAIL-  
WAY COMPANY,

*Petitioner,*

vs.

ERNEST J. GONEAU,

*Respondent.*

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## MOTION TO DISMISS OR TO TRANSFER FOR HEARING TO THE SUMMARY DOCKET.

Now comes the above named respondent and presents these motions to the Honorable the Supreme Court of the United States;

FIRST. That the writ of certiorari granted herein to review the judgment of the Supreme Court of the State of Minnesota be dismissed on the ground that said writ was improvidently granted for the reason that the facts essential to an adequate appreciation of this cause were not brought to the attention of the Court by the petition for writ of certiorari herein.

SECOND. In case said motion for dismissal be not granted, then the respondent moves the above Honorable Court that this action be transferred for hearing to the Summary Docket because the case is of such a character as not to justify extended argument.

SAMUEL A. ANDERSON,

Attorney of Record for Respondent,

St. Paul, Minnesota.

## SUPREME COURT OF THE UNITED STATES.

October Term, 1924.

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MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAIL-  
WAY COMPANY,

*Petitioner,*

vs.

ERNEST J. GONEAU,

*Respondent.*


---

NOTICE OF MOTION.

The above named petitioner is hereby notified that the respondent will, on Monday, the <sup>9th</sup> ~~10th~~ day of March, A. D. 1925, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as hearing may be had, submit for the consideration of said Court the foregoing and annexed motions, and each of them, and the brief in support thereof, hereto attached, all of which are now and herewith served upon you.

SAMUEL A. ANDERSON,

Attorney for Respondent,

St. Paul, Minnesota.

Received a copy of the foregoing notice and the brief thereto attached, by personal service thereof, this ——— day of February, 1925.

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Attorneys for Petitioner.

## STATEMENT OF THE CASE.

This action is based upon the Federal Employer's Liability Act and the Safety Appliance Acts, brought to recover damages on account of personal injuries, it being claimed that the accident was caused at least in part by violation on the part of the petitioner of the provisions of said Acts. Admittedly the petitioner at the time with the train in question was engaged and the respondent was employed in interstate commerce. The respondent having obtained a verdict and final judgment against the petitioner, affirmed by the Supreme Court of the State of Minnesota, the petitioner on application was granted a writ of certiorari by this Honorable Court.

There were three appeals by petitioner. A reversal followed the first appeal on account of error of the trial court. The second appeal was from an order, which was affirmed. The third appeal was from the final judgment. The decisions are reported as follows in the order of the appeals.

154 Minn. 1, 198 N. W. 403, 198 N. W. 405.

The respondent contends:

**FIRST.** That the writ was improvidently granted because this Court was not properly informed as to the facts.

**SECOND.** In any event, that this action should be transferred for hearing to the Summary Docket because the case is of such a character as not to justify extended argument.

## STATEMENT OF FACTS.

(The figures in parentheses refer to the folios of the printed record filed in connection with the petition for writ of certiorari.)

On October 27, 1920, one of petitioner's freight trains, westbound from Chicago, Illinois, to Superior, Wisconsin, consisting of seventy cars, broke in two about one mile west of Gordon, Wisconsin, on account of a defective coupler (67, 76, 79, 81, 103, 109). The two sections separated about 12 feet, stopping because the air hose also parted and set the brake in emergency (95). The break occurred between the 30th and 31st car, counting from the rear (1628), and on an open narrow bridge over the St. Croix River, the ties or timbers of said bridge being also separated (91, 92). It was dark at the time and raining and snowing (87, 88).

The train was being run, and respondent was employed in interstate commerce. This crew received the train at Ladysmith, a division point, seventy miles east of Gordon (65, 66, 73, 79, 81). The defective coupler was on the east end of the easterly car of the west section. The condition of the coupler and that end of the car is described by a witness for petitioner as follows:

"One buffer block broken, one end sill, two center sills bent, four horizontal carrier bolts

missing, two vertical (carrier) bolts missing, two vertical bolts too long, one on the west side, south end, seven inches, badly bent, and the other side three-quarters by four and a half" (1669).

The proper length of such bolts was four inches (1670). The carrier iron was the sole support of the outer end of the coupler or drawbar (103, 109). The nut stripped from the one remaining bolt holding the north end of the carrier iron, whereupon that end fell and worked back, and the coupler or drawbar dropped down and out from the connecting coupler (103, 109). The carrier iron was described by a car foreman witness for petitioner, as being an "angle carrier", meaning a piece of iron with two sides, the top or horizontal side being the one upon which the coupler rested and the back or vertical side extending down. Each side was provided with places for four bolts, making eight bolts in all. All four of the horizontal bolts were missing and one each of the vertical bolts from the top side, leaving only one bolt in each end, one of these being three inches too long and the other one half inch too long (1664, 1666, 1669, 1675, 1680).

Counsel for petitioner in their brief pages 7 and 8, say as to where this car entered the train:

"At Owen, a point en route, the train picked up an empty Lehigh Valley box car (being the car in question). The train continued to Ladysmith, Wisconsin, a division point, where the train crew was changed."

The respondent, acting under orders of his conductor, at once left the caboose and went forward to discover the trouble (85, 88, 90). Having learned what it was, it then became his duty at once to recouple the train so that it could continue (111). He, therefore, necessarily, in the dark and storm, went between the cars on the open ties or timbers of this narrow bridge, placed one knee or leg under the coupler or drawbar in a stooped position, took hold of the carrier iron at the same time, lifted with his knee or leg and pulled upon the carrier iron to get it back, all for the purpose of getting the drawbar or coupler in alignment so he could make the coupling (112, 119). He succeeded in getting the carrier iron back across in its original line, but the drawbar was yet too low. Therefore he hunted for, found and used shims between the carrier iron and the drawbar until he had raised it high enough to catch about one-half of the other coupler (115, 117). Then he took the proper steps to release the brakes and have the engine back and made the coupling in that form (121, 130). He gave the signal to back the train into Gordon, this being necessary because the delay put them upon the time of an eastbound passenger train (131-133). The train backed about twenty feet and the coupler again fell, the train parted about six feet and the brakes again set in emergency, the carrier iron working back as before (134, 136). Respondent at once took the same position as above described and again at-

tempted to raise the drawbar and to pull the carrier iron back, but failed to move it. He braced himself and pulled and lifted with greater effort. The carrier iron came loose suddenly and with unexpected ease, causing respondent's right foot to go down between two of the open timbers and him to be thrown from the bridge and seriously injured (137-139). He was doing the work described as a part of and solely for the purpose of getting the broken down coupler in proper alignment to make an immediate coupling.

## ARGUMENT.

## WRIT WAS IMPROVIDENTLY GRANTED.

Respondent believes that the writ was improvidently granted for the reason that counsel for petitioner, in the petition, repeatedly, erroneously and prominently assert in substance that the Supreme Court of Minnesota erred in rendering its judgment in the instant case in the various respects as set forth on pages 4 to 7 both inclusive of said petition, when in fact the judgment was not based upon any such theories or grounds thus asserted. The judgment of that Court was solely that, assuming the testimony on behalf of plaintiff to be true, then it must be held that he was at the time of his accident engaged in *a coupling operation on a car then in use*, and that, while so engaged in endeavoring to recouple the parts of the train, he met with an accident proximately caused by violation of the Acts in question. That Court specifically held that the plaintiff could not be said to have been a repair man and subject to the rules and regulations controlling the rights of repair men. Notwithstanding, counsel for the petitioner, on pages 4 to 7 in their seventeen statements as to alleged error on the part of said Court, say that the Court erred in so construing the Acts as to render nugatory the Amendment of April 14, 1910, Chapter 160, Sec. 4, which expressly permits the making on the spot of emergency repairs upon a

car becoming defective while in use, thus conveying the theory that respondent was simply engaged in making so-called emergency repairs. Immediately following, they say that said Court further erred in holding that a suspension of the use of the car after the defect arose and an attempt to repair it before again using it constituted a violation of the Acts. On the contrary, the Court held that the use of the car was not suspended under the evidence, and it clearly was not, and also held that respondent was injured while actually engaged in the work of attempting to recouple the train so as to continue the journey.

Counsel further allege that said Court erred in holding that a defective condition arising during the use of a car properly equipped with automatic couplers, *without use or attempted use* of the car after the defect arose, constituted a violation of the Federal Safety Appliance Act. The Court made no such holding. Counsel in said statement assumes other facts to be true which are not true. Thus they speak of defect arising during the use of a car "properly equipped with automatic couplers." The undisputed testimony shows that the car was not properly equipped with said automatic couplers. On the contrary, when put in the train, it was in the deplorable condition as described by a witness for petitioner, as set forth in the statement of facts. What happened when the train finally parted, was simply a culmination of the growth of the defective condition of the coupler in question. Counsel for petitioner at no time so advised the

Court. In the same statement, counsel further assumed that there was neither use nor attempted use of the car in question. But the undisputed facts disclose that the car was in use and that the plaintiff was injured while strenuously endeavoring to recouple the train so as to continue the journey.

Continuing, counsel further assert that the said Court erred in holding petitioner liable in damages because respondent fell from a bridge by reason of losing his balance *while doing repair work upon a car* in connection with which there was *no attempted use* by the petitioner. What we have said clearly discloses that this statement is not warranted by the facts. The judgment is not based in any manner upon any such alleged conditions. Throughout these statements counsel persistently assert that respondent was merely engaged *in repair work on a car not in use, on a car the use of which had been suspended, etc.*, without any foundation in the record to support any such claim. It will be seen from the statement of facts herein contained and from a reading of the opinion of said Court the plaintiff in fact was engaged in an attempt to couple, and that he was not and cannot be treated as a repair man engaged in making repairs upon a car withdrawn from use or the use of which had by petitioner been suspended until repair work was completed.

Note the following further statement by said counsel on page 5 in the sixth statement of alleged error:

"Error in holding that the benefits of the Federal Safety Appliance Act \* \* \* extended to an employee who is *merely* putting a coupler in condition for use, which use is distinctly *of the future* and not of the present."

How misleading this statement is. How contrary to the facts which must be accepted as final, and to the unmistakable language of the said Court.

The same persistent misstatement continues throughout all or nearly all of said seventeen alleged erroneous foundations upon which said judgment was rendered.

Respondent further calls attention to a statement made near the bottom of page 3 of the petition as follows:

"It is undisputed that after the arising of the defect and consequent separation of the cars, there was no movement nor use, *nor attempted movement or use* of the defective car nor in fact of any part of the train."

The respondent was injured while actually attempting to make a coupling to a car with a defective coupler forming part of an interstate train and *solely for the purpose of immediately enabling the petitioner to continue the journey*. He succeeded in a manner in bringing the cars together and coupling and moved the train backward until it separated again. When injured, he was actually engaged in attempting to repeat the operation. Certainly such statements are not conducive to

advising this Court properly as to the real controlling facts in the case.

Immediately following this on the same page counsel say:

"The testimony of all the rest of the train crew, as well as the physical facts, show that plaintiff got the carrier iron in place and fastened; that he coupled the cars properly and coupled the air hoses; that he then stepped out to the side of the train to signal its movement, but stepped too far out and off the edge of the bridge."

This statement is not correct. It is merely a brief of the testimony on behalf of the petitioner, contradicted by testimony on behalf of respondent. The State Supreme Court necessarily proceeded upon the theory that the jury, as it did in fact, had found the testimony on behalf of respondent to be true and that contained in the above statement not true. Having so held, then the facts controlling in these proceedings are necessarily as set forth in this motion.

*Aetna Life Ins. Co. v. Dunken*, 45 S. C. R. 209.

After thus first and prominently asserting that respondent was injured while simply engaged in repair work, and that the Court erred in various ways in rendering judgment upon foundations or grounds found not to exist, then counsel did state that the train in question, broke in two and stopped by the application of the brakes at the place referred to, separating, as set forth in the state-

ment of facts herein, on the bridge in question. They also state briefly that respondent worked the drawbar back into position and blocked it up and coupled the train and attempted to back up with results following substantially as herein stated as to the train breaking in two again. Then they say that respondent proceeded "to make the repairs necessary upon the carrier iron", described the position he assumed and what happened. But, at the bottom of page 9, they say, notwithstanding the undisputed testimony:

"The sole bad order feature was the coming off of the nut from the lower end of the bolt on the right hand side of the carrier iron."

Then follows counsel's brief, very largely based upon the proposition that the State Supreme Court erroneously held that respondent was entitled to recover under the Acts notwithstanding the fact that he was simply engaged in repair work upon a car not then in use, but upon a car which petitioner immediately after the defect arose refrained from using and was endeavoring to repair before using it further.

Referring to page 17 of their petition and brief, counsel quote from the Delk case and immediately follow that quotation with the statement:

"In the instant case, after the car become defective petitioner *did* refrain from using it and endeavored to have it repaired before using it further."

The quotation from the Delk case is as follows, the italics being by counsel for petitioner:

*"After the coupler became defective and could not be coupled without going between the ends of the cars, it became unlawful for the railroad company to haul it, or permit it to be hauled or used on its line. It then became the duty of the railroad company to withdraw the car from use and have it repaired to conform with the law before using it further. It did not do this but continued to use the car in its defective condition."*

Counsel then immediately say that petitioner *did* refrain from using the defective car as soon as it became defective and was endeavoring to have it repaired before using it further. They claim that this was the foundation of the State Court's decision. The persistent tendency of the petition and brief is to lead this Court to the conclusion that respondent was repairing substantially as a repair man and subject to the obligations and having only the rights of the ordinary repair man on a car not then in use within the meaning of the Federal Act. This is all contrary to the facts.

In the first opinion, 154 Minn. 1, on pages 4 and 5, the State Supreme Court says:

"Defendant insists that its motion for judgment should have been granted because the automatic coupler provisions of the Federal Safety Appliance Act apply only where a car is moved for the purpose of coupling or uncoupling it, and that they do not apply if the

injury results from an attempt to repair a defective coupler on a motionless car. We do not stop to inquire whether this is a correct interpretation of the act. The conditions were such that a coupling could not be made automatically by impact. If plaintiff was attempting to bring the drawbar back to its proper position so the coupling could be made, we think the protection of the act extended to him while he was so engaged. *Louisville & N. T. Co. v. Layton*, 243 U. S. 617, followed in *Clapper v. Dickinson*, 137 Minn. 415.

"Assuming that the accident happened in the manner described by plaintiff, can it be said that the violation of the act was the proximate cause of his injuries? We think the question requires an affirmative answer. It matters little whether he was attempting to make the coupling or right the position of the drawbar so the coupling could be made automatically by impact. In either case the chain of events extended uninterruptedly from the defective appliance to the injury, and there was the direct causal relation which the law requires."

On the second appeal, where the facts were substantially the same, the State Supreme Court applied the rule of the law of the case, and said, on page 404 of 198 Northwestern Reporter:

"Defendant contends that plaintiff was not engaged in a coupling operation when he met with his injury, but was repairing the car and exactly in the same position as a repair man if the car had stood upon a repair track in some yard of defendant's; that the train was

at rest and there could be no attempt to use the coupler until after it had been repaired; and therefore the defective coupler as a matter of law could not be the proximate cause of the injury any more than in the cases of *St. Louis & San Francisco Ry. Co. v. Conarty*, 238 U. S. 243, and *Lang v. New York Central Ry. Co.* 255 U. S. 455, where it was so held. In those cases there was a collision with a bad order car with drawbar and coupler gone. It was not intended to couple onto or move the bad order car, but by mischance the car in one case and the locomotive in the other, upon which the employee rode, bumped into the bad order car and crushed him. Had the drawbar and coupler been present, the person or the employee could not have been harmed, for he was in a safe place if a car equipped with a coupler, such as the law requires, had been bumped into. But here there was an intention to couple onto the defective car. It was imperative to move it immediately. Plaintiff had to prepare the coupler so it would couple with the other car. He was not a repair man. Emergency repairs which, at times, he as brakeman was called to do in order to couple up trains that break in two in transit should not place him in the class of ordinary repair men doing their work with proper tools, appliances and protection. Here the defective coupler caused plaintiff to go between the cars and attempt to put it in condition to couple, and in that attempt he was injured. Under the circumstances he was actually engaged in a coupling operation."

Then the Court says further:

"It seems to us that in the instant case the defective coupler may be said to be the cause, for the very attempt to prepare it for immediate coupling up and movement of the train directly caused the plaintiff's fall."

"In our opinion the facts of this case are more nearly akin to those in *Erie Ry. Co. v. Russell*, 183 Fed. 723, than any other to which attention has been drawn. Certiorari therein was denied (220 U. S. 607). This must be taken as an affirmance of the law as stated and applied by the Circuit Court of Appeals. There the car with the defective coupler was not being hauled. It was stopped temporarily for the insertion of a knuckle, but it was intended to couple it to other cars as soon as repaired. Russell was holding the knuckle in place with his back to three cars standing at some distance, while a fellow servant hunted for a pin that would fit. The standing cars, without any apparent cause, moved down upon Russell and crushed him. It was held that the trial court properly submitted to the jury the question whether the presence of the defective coupler was the proximate cause of the accident."

"We still are of the opinion that if plaintiff's story was true, and the jury so found, the verdict finding the defective coupler the proximate cause of the injury was justified, and that nothing has been stated by the Supreme Court of the United States since our former decision to warrant us in disregarding the binding effect of that decision. That this was a defective coupler cannot be denied. It

was rendered defective because the carrier iron was not properly attached. Unless this iron was securely fastened at both ends, the coupler could not be kept in condition either to couple onto or stay coupled to another car. Instead of eight bolts, securely affixed with burrs as designed, this carrier iron had left only one bolt and that several inches too long, by which it hung to the car when plaintiff undertook to make the coupling of the parted train. Surely this was a clear violation of the act."

Here we have a clear statement of the basis of the Supreme Court's decision. Nothing can be clearer than that counsel for petitioner have, probably unconsciously, so formulated its petition as to wholly mislead or at least to tend to mislead this Honorable Court as to the true facts and the true foundation of the State Supreme Court's decision.

UNDER THE FOLLOWING DECISIONS OF THIS HONORABLE COURT IT IS SETTLED BEYOND CONTROVERSY THAT THE CAR IN QUESTION WAS IN USE AT ALL TIMES.

*Erie R. Co. v. Russell*, 183 Fed. 722.

Same case, 220 U. S. 607.

*Johnson v. Southern R. Co.* 196 U. S. 1.

*Johnson v. G. N. R. Co.* 178 Fed. 643.

*Chicago, etc. R. Co. v. King*, 169 Fed. 372.

Same case, 222 U. S. 222.

*U. S. v. St. Louis & R. Co.* 184 Fed. 128.

*G. N. R. Co. v. Otos*, 239 U. S. 340.

Nevertheless counsel for petitioner attempt to impress upon this Court the idea that it was undisputed that the car was not in use as well as that petitioner had suspended its use until it had succeeded in repairing the coupler in conformity with the requirements of the law.

For the above reasons the respondent feels justified in concluding that the writ was improvidently granted, and in asking for a dismissal of the case.

DISMISSAL IS PROPER WHERE SUCH A WRIT IS IMPROVIDENTLY GRANTED.

Forsyth v. Hammond, 166 U. S. 504.

Furness, Withy, etc. Co. v. Yang-Tsze, 242 U. S. 430.

Houston Oil Co. v. Goodrich, 245 U. S. 440.

Southern Power Co. v. N. C. etc. Co. 44 S. C. R. 164.

In the last case this Court says with reference to such petitions that there exists "a necessity for clear, definite and complete disclosures concerning the controversy."

In the Furness case this Court says:

"The writ of certiorari was improvidently granted and must be dismissed. We should have denied the petition therefor if the facts essential to an adequate appreciation of the situation had been brought to our attention. Petitions of this character are at the risk of the party making them, and whenever in the progress of the cause the facts develop which,

if disclosed on the application, would have induced a refusal, the Court may, upon motion by a party, or *ex mero motu*, dismiss the writ."

IF THE ABOVE MOTION FOR DISMISSAL BE DENIED, THEN RESPONDENT MOVES THAT THIS ACTION BE TRANSFERRED FOR HEARING TO THE SUMMARY DOCKET.

Respondent asks for such transfer for the reason that this case is of such a character as not to justify or to call for extended argument in any event. It will appear from the statement of facts, which must be accepted as final, and from the decisions heretofore cited, that the only question presentable to this Court is as to whether or not under the Employer's Liability Act and the Coupler Act, respondent was entitled to judgment because the admitted violation of the laws by petitioner directly contributed, at least in some degree, to his accident and injuries. It appears without question that the coupler was very defective. Also, when the train finally parted for said reason, the respondent, a brakeman, in the darkness and storm, and because of such violation of the law, was compelled to go between the cars, upon this open and narrow bridge with open timbers, and there engage in a strenuous endeavor to bring the defective coupler back into proper alignment so that an immediate coupling could be made. Also, that, while he was in an awkward position, and while he was exerting great physical power upon said defective coupler or one of its parts so as to make the coup-

ling, that defective part suddenly and unexpectedly came loose, thus causing one of his feet to go between the open timbers and him to be thrown from the bridge to his injury. Hence respondent feels justified in the statement that the only question which can be presented, notwithstanding the large number of assignments of error presented by counsel for petitioner, is as to whether or not said violation of the law contributed to said accident and injuries. Respondent contends, in this connection, that this question has been settled in his favor by the following decisions:

St. Louis R. Co. v. Taylor, 210 U. S. 281.

Chicago, etc. R. Co. v. U. S. 220 U. S. 559.

Delk v. R. R. Co. 220 U. S. 580.

Chicago, etc. Ry. Co. v. Browb, 229 U. S. 317.

Baltimore & O. R. Co. v. Groeger, 45 S. C. R.

169,

showing that the duty to have couplers in proper condition is absolute, imperative and continuous.

Erie R. Co. v. Russell, 183 Fed. 722.

Same case, 220 U. S. 607.

Johnson v. Southern R. Co. 196 U. S. 1.

Johnson v. G. N. R. Co. 178 Fed. 643.

Chicago, etc. R. Co. v. King, 169 Fed. 372.

Same case, 222 U. S. 222.

U. S. v. St. Louis & R. Co. 184 Fed. 128.

G. N. R. Co. v. Otos, 239 U. S. 349,

showing that the car was in use within the meaning of the Acts.

Erie R. Co. v. Russell, 183 Fed. 722.

Same case, 220 U. S. 607.

Chicago, etc. R. Co. v. King, 222 U. S. 222.

Chicago, etc. Ry. Co. v. Brown, 229 U. S. 317.

M. & St. L. R. Co. v. Gotschall, 244 U. S. 66.

Davis v. Wolfe, 44 S. C. R. 64.

Louisville etc. R. Co. v. Layton, 243 U. S. 617.

Grand Trunk v. Lindsay, 233 U. S. 42.

Erie Ry. Co. v. Caldwell, 264 Fed. 947.

Spokane etc. Co. v. Campbell, 217 Fed. 518.

Same case, 241 U. S. 495.

And also

Fletcher v. S. D. R. Co. 36 So. Dak. 401.

Burho v. R. R. Co. 121 Minn. 326.

Ahrens v. Ry. Co. 120 Minn. 335.

Pound v. Ry. Co. 114 Minn. 312.

Sprague v. Ry. Co. 104 Minn. 58.

Calhoun v. Ry. Co. 162 Wis. 264,

all showing that the defective coupler must be considered a contributing cause to the accident and injuries.

CASE INVOLVES ONLY AN APPRECIATION OF THE FACTS.

In the last analysis, it appeals to respondent that the case really involves only an appreciation of the facts and the question whether upon such facts liability exists.

Great N. R. Co. v. Knapp, 240 U. S. 264.

At any rate, the instant case involves no great legal principle.

The cause is one which can fully and adequately be presented to the Court within the time allotted on the Summary Docket. There has already been great delay since the writ was granted and the respondent is informed that there will be also further great delay unless the case is placed upon the Summary Docket. Hence respondent respectfully petitions, in case his motion for dismissal is denied, that this case be placed upon the Summary Docket for an early hearing.

Dated at St. Paul, Minnesota, February 12,  
1925.

Respectfully submitted,

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